Supreme Court, U.S
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09-63 JUL 13 2009 (1)

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No. _____ CAPITAL CASE

In The
Supreme Court of the United States

E.K. McDANIEL, WARDEN,
Petitioner,

v.

RICKY DAVID SECHREST,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED: CAPITAL CASE

This Court has held in capital cases that mandatory death sentences are unconstitutional because they do not allow "consideration of the character and record of the individual offender and the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). This Court has also held that "the entire post-conviction record, viewed as a whole" must be considered in determining whether error occurred. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). With these two cases in mind, Petitioner presents the following question:

Did sentencing phase error require the Ninth Circuit Court of Appeals to reverse a sentence of death?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption.

The Petitioner is E. K. McDaniel, Warden of the Ely State Prison, who has constructive custody over the Petitioner. John Ignacio, the former Warden of the Nevada State Prison, was the previous Warden listed as the Appellant in the United States Court of Appeals for the Ninth Circuit. Fed. R. App. P. 43(c); Sup. Ct. R. 35(3).

The Respondent is Ricky David Sechrest.

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PETITION FOR WRIT OF CERTIORARI

Petitioner E. K. McDaniel, Warden of the Ely State Prison ("Warden"), respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is published at 549 F.3d 789 (9th Cir. 2008). Pet. App. 1a. The Order of the United States District Court denying petition for writ of habeas corpus is unpublished. Pet. App. 50a. The Nevada Supreme Court's opinion affirming the petitioner's conviction and sentence is published at 705 P.2d 626 (Nev. 1985). Pet. App. 146a. The Nevada Supreme Court's opinion affirming the denial of state post-conviction relief is published at 826 P.2d 564 (Nev. 1992). Pet. App. 159a.

JURISDICTION

The Court of Appeals entered its decision on December 5, 2008. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on April 14, 2009. Pet. App. 166a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The former provisions of 28 U.S.C. § 2254 apply to this case. Pet. App. 168a. Respondent Ricky David Sechrest filed his federal petition for writ of habeas corpus prior to April 24, 1996.

STATEMENT OF THE CASE

Ricky David Sechrest ("Sechrest") horrifically murdered two small, vulnerable children, aged nine and ten. When suspicion fell upon him, and he was interviewed by police, he confessed his crimes, describing how he lured the two girls from a local ice-skating rink by claiming that his grandmother, the babysitter for one of the two girls, had sent him to the ice arena to pick the girls up.

After abducting these two children, Sechrest took them to remote area near Reno, Nevada. There, according to Sechrest's confession, he murdered both children before masturbating over one of the bodies.

Not surprisingly, a jury found Sechrest guilty of two counts of first-degree murder and first-degree kidnapping. Also not surprisingly, the same jury sentenced Sechrest to death.

However, during the penalty hearing, the defense attorney, Don Aimar, did not object when the prosecutor called a defense-retained psychiatrist, Dr. Lynn Gerow, as a witness. Dr. Gerow testified that Sechrest was a sociopath and unlikely to change. Of course, this was already readily apparent to the jury based on the facts surrounding the two murders and the manner in which they were committed.

Additionally, in his closing argument during the penalty phase, the trial prosecutor minimized the chances that Sechrest would actually die in prison if sentenced to life without the possibility of parole.

The Nevada Supreme Court affirmed Sechrest's conviction and sentence. *Sechrest v. State*, 705 P.2d 626 (Nev. 1985); Pet. App. 146a. Six and a half years later, the Nevada Supreme Court also affirmed the denial of state post-conviction relief. *Sechrest v. State*, 826 P.2d 564 (Nev. 1992); Pet. App. 159a.

Sechrest then turned to the federal courts. Ultimately, the Ninth Circuit Court of Appeals granted Sechrest habeas corpus relief on the penalty phase of his trial. *Sechrest v. Ignacio*, 549 F.3d 789 (9th Cir. 2008); Pet. App. 1a.

Despite the depravity of Sechrest's crime, the Court of Appeals found that the prosecutor's comments violated Sechrst's due process rights and that these comments had a substantial and injurious effect on the jury's verdict. *Sechrest*, 549 F.3d at 808 (*citing Brecht v. Abrahamson*, 507 U.S. 619, 627 (1991)); Pet. App. 42a-43a. Likewise, the Court of Appeals found that trial counsel's conduct, in allowing Dr. Gerow to testify, fell below an objective standard of reasonableness and that Sechrest was prejudiced by counsel's conduct. *Id.* at 815 (*citing Strickland v. Washington*, 466 U.S. 668, 688 (1984)); Pet. App. 43a-44a.

Additionally, the Court of Appeals dismissed Petitioner's argument that the nature of Sechrest's crime made a sentence of death almost inevitable:

> Finally, the State argues that because Sechrest's crime was one "of utter depravity-unthinkable by most people in the abstract," we would "demean both *Brecht* and the jury that sentenced Sechrest to death" if we held that the

> constitutional violation prejudiced Sechrest. This argument, however, is analogous to the argument that the Supreme Court condemned in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In *Godfrey*, the Supreme Court reviewed an affirmation of a death sentence "based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 428, 100 S.Ct. 1759. The Supreme Court reversed, reasoning that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.* at 428-29, 100 S.Ct. 1759.
>
> In short, all first degree murders can be described as "unthinkable." Merely labeling them as such does not mean that all jurors will find that they warrant the death penalty, nor does the label relieve us of our duty to determine whether the constitutional errors that occurred in this case deprived Sechrest of a fair trial.

549 F.3d at 814-15; Pet. App. 42a.

By contrast, the state district judge who ruled on Sechrest's state post-conviction petition noted:

> There are capital cases which seem borderline because of the confused mental state of the Defendant or perhaps the degree of provocation

> from the victim or victims. There are capital cases which seem borderline because of the motive of the Defendant or because of some mitigating aspect about his or her character. In a given case, evidence of profound remorse can play a role.
>
> Nothing like these circumstances are present in the case of Ricky Sechrest. This Court does not feel that this case is borderline, or that Ricky Sechrest was denied a fair hearing.

Pet. App. 183a-84a.

The Court of Appeals denied rehearing and the suggestion for rehearing *en banc*. Pet. App. 166a. This timely petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

In deciding federal habeas corpus cases, the Ninth Circuit Court of Appeals has ignored or misapplied this Court's precedent, finding error in the sentencing phase of capital litigation at a rate disproportionate to the amount of error found in the guilt phase of capital litigation. *See, e.g.*, *Brown v. Sanders*, 546 U.S. 212, 215 (2006) (addressing only death sentence after Court of Appeals upheld guilt verdict but overturned death sentence); *Calderon v. Coleman*, 525 U.S. 141, 144 (1998) (noting Court of Appeals upheld guilt verdict but overturned death sentence); *Styers v. Schriro*, 547 F.3d 1026, 1036 (9th Cir. 2008) (upholding guilt verdict but overturning death sentence); *Hovey v. Ayers*, 458 F.3d 892, 931 (9th Cir. 2006) (same).

There may be a variety of reasons that a habeas petitioner receives relief for a death penalty more often than for the underlying conviction. Respectfully, it appears that one such reason is that federal courts look at the guilt and sentencing phases as two discrete events, rather than by looking at both phases as two portions of one trial—and forget that jurors have often heard days and sometimes weeks of testimony about the brutal nature of an offense. These jurors have already found, beyond a reasonable doubt, that the defendant committed the crime. Reviewing courts, such as the Ninth Circuit Court of Appeals, appear to overlook the facts supporting the conviction and the weight of aggravating evidence presented when choosing to reverse a sentence of death.

The Warden agrees with this Court's jurisprudence that the death penalty should not be "automatic," but rather that States must "limit the class of murderers to which the death penalty may be applied." *Brown*, 546 U.S. at 216. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (mandatory death sentences unconstitutional because they do not allow "consideration of the character and record of the individual offender and the circumstances of the particular offense"). Petitioner does not seek to undermine this principle. However, error alone should not be sufficient to overturn a death verdict without weighing the effect the alleged error had on the outcome of the penalty phase.

This Court has also held that "the entire post-conviction record, viewed as a whole" must be considered in determining whether error occurred. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). Appellate courts, such as the one in this very case, give

passing reference to this principle without recognizing that certain classes of homicides, either because of the nature of the perpetrator or the nature of the killing itself, make the imposition of a death sentence highly probable. In such a case, while the jury is never required to impose a death sentence, only the most compelling of mitigation evidence will forestall a sentence of death.

This Court has held that a death penalty regime must "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). To that end, the Court noted, "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.* at 428-29.

Justice Stewart authored *Godfrey* for the Court. However, Justice Stewart is also famously remembered for his concurrence in an obscenity case where he stated, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Likewise, the kidnapping and killing of young children, particularly if there is a sexual element as part of the offense, is one such circumstance where people know it is likely a capital case when they hear about it.[1]

---

[1] Killing a police officer in the line of duty; causing wanton pain and suffering before the actual killing; and serial homicides might qualify as other circumstances where a sentence of death is more likely than not to be imposed absent the most compelling mitigation evidence.

As this Court is well aware, in order for a habeas corpus petitioner to obtain relief, he or she is required to show that any error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 509 U.S. 619, 638 (1993).

In this particular case, the prosecutor's comments during the closing argument in the penalty phase did not have either a "substantial and injurious effect" or any "influence" whatsoever in determining the jury's verdict.

The jury had been presented with overwhelming evidence, including Sechrest's own confession, and knew already how monstrous Sechrest's crime actually was. According to the Nevada Supreme Court:

> In April of 1983, Doris Schindler hired Zella Weaver to baby-sit her ten-year old daughter, Maggie Schindler. In addition to caring for Maggie during weekday afternoons and evenings at the Schindler residence, Mrs. Weaver would pick Maggie up from the Meadowood Ice Arena when Maggie was through ice skating on Saturdays.
>
> On May 14, 1983, a neighbor of the Schindler's drove Maggie and her friend, Carly Villa, to Meadowood and dropped them off to skate. Later that afternoon Mrs. Weaver went to Meadowood to pick up Maggie and Carly but could not find them. The police were notified, and an investigation was begun.
>
> On June 7, 1983, the bodies of Maggie and Carly were found in Lagomarsino Canyon, a

remote area east of Reno, by two young men who were out shooting. The bodies, which had been covered with loose dirt, were found about 50 yards apart. A pair of ice skates and skate guards with the name "Maggie S." on them were found near one of the gravesites.

Ricky David Sechrest is Zella Weaver's grandson and lived at her home. Sechrest had been seen outside the Schindler home several times while waiting to pick up his grandmother when she finished baby-sitting there. The record establishes that Maggie had been at the Weaver residence before and that Sechrest knew that his grandmother routinely picked Maggie up at Meadowood Mall on Saturdays.

On June 14, 1983, Sechrest gave an inculpatory statement to Officer Bogison and Detective Eubanks of the Reno Police Department while he was being questioned at the Sparks Police Department on an unrelated grand larceny charge. He admitted that he had picked up Maggie and Carly from the Meadowood Mall Ice Arena. He said that he asked Maggie if she wanted to go for a ride and she had agreed. They drove out to Lagomarsino Canyon. Sechrest claimed that they were walking around the hills rock hunting when Carly fell over backward and hit her head. Sechrest said he thought the girl was dead because when he checked her pulse, she did not have one. He said Maggie began to "freak out on him" and was "between hysterical and crying." Sechrest said that he knew it was wrong to be up there with the girls to begin with, so when Maggie

> began to run he panicked, caught her and hit her over the back of the head with a rock. After hitting the girl three or four more times with the rock after she had fallen, Sechrest went to his car and got a shovel. He returned to where Carly was lying and thought she was still alive; so he hit her "once or twice" in the head with the edge of the shovel. He then buried the girls with loose dirt. In his statement Sechrest admitted that he performed an act of masturbation on Maggie's body, but, according to him, at the time the girl was already dead.

Sechrest v. State, 705 P.2d 626, 628-29 (Nev. 1985); Pet. App. 147a-48a. Faced with these facts, nothing but the most compelling argument or evidence that anyone could make or present during the sentencing phase would have had a substantial and injurious effect on the jury's verdict.

In this case, the Court of Appeals held:

> [T]he prosecutor's repeated misstatements regarding the likelihood of Sechrest's release from prison by parole were he to be sentenced to life without the possibility of parole violated Sechrest's due process right to a fair trial, and that the violation had substantial and injurious effect on the jury's sentencing decision, carried out by the trial judge, to impose the death penalty.

Sechrest, 549 U.S. at 808; Pet. App. 27a. This conclusion flies in the face of the overwhelming evidence presented at the guilt phase. Assuming, without conceding, that the prosecutor made four

improper comments regarding Sechrest's ultimate sentence, there is little the prosecutor could have said or done that would have made the jury more likely to impose a sentence of death than it already was.

As the District Court eloquently stated:

> The Court finds that the most important considerations informing the jury's sentencing decision must have been the aggravating circumstances related to the nature of the crimes. The jury found that the murders were committed in the course of kidnappings and sexual assaults, and that they were committed to avoid lawful arrest or effect an escape from custody. The jury also found that the murders involved torture, depravity of mind, or mutilation of the victims. Sechrest took two innocent and trusting young girls—one nine years old and the other ten years old—to a remote location and brutally murdered then using rocks and a shovel. Sechrest then undressed one of the dead girls, attempted to have intercourse with her lifeless body, and then, when he could not, masturbated and ejaculated onto her body. The aggravating factors related to the specific circumstances were surely the predominate factor behind the jury's imposition of the death penalty. In view of the entire record in this case, the Court finds that the misstatements of the prosecutor regarding the possibility of executive clemency

> did not have a substantial and injurious effect or influence in determining the jury's verdict.

Pet. App. 80a-81a.[2]

The District Court's analysis was similar to a conclusion the Seventh Circuit found in another death penalty case. "[E]ven without this evidence, the jurors had *overwhelming* evidence from which they could conclude that Jones was a ruthless and habitual killer deserving of the death penalty. In other words, the scales were already *heavily* tipped in the direction of Jones's fitness for the death penalty." *Jones v. Page*, 76 F.3d 831, 855 (7th Cir. 1996).

The same can be said with respect to the Court of Appeals' finding of ineffective assistance of counsel during the penalty phase. As this Court is well aware, in order for counsel's conduct to be ineffective as a matter of law, the conduct must 1) fall below an objective standard of reasonableness; and 2) prejudice the defendant. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). More specifically, "When a defendant challenges a death sentence, . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. *Cf. Bible v. Ryan*, No. 07-99017, 2009 Westlaw 1874343,

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[2] In making this analysis, the District Court assumed that Sechrest received ineffective assistance of counsel, even though the District Court ultimately found that counsel was not ineffective.

*9 (9th Cir. July 1, 2009) (upholding death sentence and following *Strickland* standard).

Assuming without conceding that defense counsel's conduct fell below an objective standard of reasonableness when he agreed to allow the prosecution to call a defense psychiatrist as a witness during the penalty phase, there is, again, no way that this testimony created a reasonable probability that the result of the sentencing would have been different. The jury had already heard the gruesome evidence with respect to Sechrest's homicide. Once the prosecution presented evidence of the aggravating circumstances, nothing but the most compelling defense argument or evidence would have saved Sechrest from a death sentence.

Of course, no compelling argument was made. This left the Ninth Circuit Court of Appeals to place unreasonable weight on the effect the alleged error had on the sentencing jury.

In addition to finding that trial counsel's conduct was reasonable, the District Court also concluded that Sechrest was not prejudiced:

> The testimony of Dr. Gerow did not bear on any of the aggravating circumstances found by the jury. Those aggravating circumstances would have weighed heavily on the side of death penalty even if Dr. Gerow had not testified.
>
> With the respect to possible mitigation, absent the testimony of Dr. Gerow, Sechrest may have been better able to argue for mitigation on the basis of a lack of a prior criminal record. The

Court, however, finds that this would have made little difference. As it was, Aimar was able to show that Sechrest had no crimes of violence in his criminal record; given the nature of the crimes at issue in this case, that was the main point to be made.

Also, generally, without the testimony of Dr. Gerow, Sechrest could have made a better case that he might be able to change for the better while in prison. This is where Dr. Gerow's testimony was, perhaps, most harmful to Sechrest. It was clear to the jury that Sechrest was dangerous; Dr. Gerow's testimony was that he would not change. Even here, however, the Court finds that the damage was minimal in comparison to the nature of the aggravating factors.

The jury found that the murders were committed in the course of kidnappings and sexual assaults, and that they were committed to avoid lawful arrest or effect an escape from custody. The jury found that the murders involved torture, depravity of mind, or mutilation of the victims. Sechrest took two young girls into the hills and bludgeoned them to death with rocks and a shovel. He undressed one of the girls, attempted to have intercourse with her dead body, and when he could not, he masturbated, and ejaculated onto the girl's body. The aggravating factors found by the jury, rooted in the terrible circumstances of the killings, are such that this Court cannot find any reasonable probability that Sechrest might

> have avoided the death penalty if Dr. Gerow had been precluded from testifying.

Pet App. 141a-42a.

The District Court's analysis was similar to a conclusion the Fourth Circuit found in another death penalty case.

> As did the district court, we recognize that the overwhelming case against Eaton made the task of defending him very difficult. . . . Further, in the face of the Commonwealth's overwhelming evidence, we can ascribe no prejudice to any alleged errors by counsel; like the district court, we cannot identify a reasonable probability that Eaton would have escaped conviction and a sentence of death.

Eaton v. Angelone, 139 F.3d 990, 994 (4th Cir. 1998).

Sechrest committed horrible, brutal crimes. The Court of Appeals erred in its analysis. The Warden respectfully asks this Court to grant certiorari and review this case.

CONCLUSION

The Warden respectfully asks that this Court grant his Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals.

Respectfully Submitted,

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APPENDIX

APPENDIX A

549 F.3d 789 (9th Cir. 2008)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-99004

[Filed December 5, 2008]

RICKY DAVID SECHREST, *Petitioner-Appellant,*	)
v.	)
JOHN IGNACIO, Warden, *Respondent-Appellee.*	)

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, District Judge, Presiding

Argued and Submitted
February 15, 2007—Pasadena, California

Before: Harry Pregerson, William A. Fletcher, and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Pregerson

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George J. Chanos and David K. Neidert, Office of the Nevada Attorney General, Reno, Nevada, for the respondent-appellee.

OPINION

PREGERSON, Circuit Judge:

In this pre-AEDPA capital case, Ricky David Sechrest appeals the denial of his third amended petition for a writ of habeas corpus under 28 U.S.C. § 2254.[1] We affirm in part, reverse in part, and remand for further proceedings.

---

[1] AEDPA, the Antiterrorism and Effective Death Penalty Act of 1996, altered the role of the federal habeas court in reviewing state prisoner applications brought under 28 U.S.C. § 2254. *See Bell v. Cone*, 535 U.S. 685, 693 (2002). Under AEDPA, a federal court may reject a state court's judgment only if it was "contrary to" or "involved an unreasonable application of" clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). However, AEDPA does not apply to the merits of petitions filed before April 24, 1996, the effective date of the Act. *See Caswell v. Calderon*, 363 F.3d 832, 836 n.3 (9th Cir. 2004). Because Sechrest filed his first federal habeas petition before AEDPA's 1996 enactment, AEDPA does not affect our analysis in this case.

JURISDICTION

We have jurisdiction over the district court's denial of Sechrest's third amended federal habeas petition pursuant to 28 U.S.C. §§ 1291 and 2253(c).

FACTUAL BACKGROUND

On May 14, 1983, twenty-two-year-old Ricky Sechrest kidnapped and murdered ten-year-old Maggie Weaver and nine-year-old Carly Villa. A few weeks later, two men found the girls' bodies in Logomarsino Canyon, a remote area east of Reno, Nevada.

On June 14, 1983, Sechrest was arrested by the Sparks, Nevada police on an unrelated grand larceny charge. Detective Wright of the Sparks police informed Sechrest of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and asked Sechrest if he wanted to talk about the grand larceny charge. Sechrest replied that he wished to speak with his attorney. At that point, questioning ceased.

The Sparks police then took Sechrest to the station for booking. While Sechrest was waiting to be booked, he turned to Detective Wright and another officer, Sergeant Gonyo, and said, "I like you two guys, I don't want an attorney, I will talk with you." The officers finished booking Sechrest and gave him a standard form for waiving his *Miranda* rights. Sechrest read and signed this form in the presence of the officers.

The Sparks officers proceeded to question Sechrest about the grand larceny charge. During questioning, Sechrest stated that the Reno police were investigating him as a possible suspect in a homicide. The Sparks

officers, however, did not question Sechrest about the homicide.

When the Sparks officers finished questioning Sechrest, Sergeant Gonyo left the room. He returned to inform Sechrest that Officer Bogison of the Reno Police Department was outside. Sergeant Gonyo asked Sechrest if he would like to talk to Officer Bogison, with whom Sechrest had spoken over the past few days. Sechrest replied, "Yes, I like Mr. Bogison, he is the only one on my side, and [he] understands me." Officer Bogison then approached Sechrest and said, "I understand you want to talk to me, is that right?" Sechrest replied, "Yes." Sechrest also stated that he had spoken with his attorney and had been advised to "keep his mouth shut." Officer Bogison responded, "Well, there is nothing we can do to alter that . . . do you want to talk to me?" Sechrest replied, "I will tell you what, I will make a deal—no, I won't make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won't." Bogison then asked again, "Does this mean you want to talk to us?" Sechrest answered, "Yes."

Sechrest entered an interrogation room with Officer Bogison and another Reno officer, Detective Eubanks. Before the interrogation began, Sechrest requested permission to call his grandmother and his attorney. Sechrest first called his grandmother. When that call ended, Officer Bogison asked Sechrest if he wished to call his attorney. Sechrest said, "No, I want to get this off my chest." Shortly thereafter, Sechrest confessed to the two murders.

Before trial, Sechrest moved under *Miranda* to suppress the confession he made to the Reno police

officers. Following an evidentiary hearing, the trial judge ruled that Sechrest's *Miranda* rights had not been violated and that Sechrest's confession could be admitted into evidence.

Sechrest's seven-day jury trial began on September 12, 1983, in Nevada's Second Judicial District Court. During his voir dire of the jury, the prosecutor made two statements suggesting that Sechrest would not actually serve a full term of life imprisonment if he were sentenced to life in prison without the possibility of parole:

> *Statement #1*: The judge is going to give you an instruction at the penalty phase, if we get there, that he will impose the penalty that you say, but if you say life in prison without parole, that doesn't mean that the pardons board can't let him out. Now, would you consider that when you arrive at your verdict?
>
> *Statement #2*: Okay. Now, [defense counsel] has talked a lot about the possible penalties if we get there being life with possibility of parole, life without possibility of parole and death. And His Honor will, I imagine, because many times I have been in front of His Honor, will give you a charge, a jury instruction saying if you impose life without parole that really doesn't mean life forever. If he gives you that charge, will you take that into consideration in deciding what the verdict ought to be?

Defense counsel did not object to these statements.

On September 19, 1983, the jury convicted Sechrest of two counts of first degree murder and two counts of first degree kidnaping.

The penalty phrase of Sechrest's trial began on September 26, 1983. The prosecution's primary penalty phase witness was Dr. Lynn M. Gerow. Dr. Gerow's involvement in the case began several months before trial when, at defense counsel's request, the trial judge appointed Dr. Gerow to conduct a psychiatric evaluation of Sechrest. Using Dr. Gerow's evaluation, defense counsel sought to determine whether Sechrest was fit to stand trial, and to investigate the possibility of an insanity defense.

Dr. Gerow interviewed and evaluated Sechrest. He then submitted a report addressed to defense counsel marked "Confidential." The report contained information about Sechrest's criminal history and past drug use. In the report, Dr. Gerow stated that Sechrest had a "polymorphous perversion." After reviewing the report and speaking with Dr. Gerow, defense counsel decided not to call Dr. Gerow as a witness at the penalty phase and not to pursue an insanity defense.

The prosecutor then asked defense counsel to permit the use of Dr. Gerow's report and to permit the prosecutor to call Dr. Gerow as a prosecution witness during the penalty phase. Defense counsel, who last communicated with Dr. Gerow about two months before trial, stipulated to the prosecution's request and did not object when Dr. Gerow took the stand. Dr. Gerow testified that he had evaluated Sechrest at defense counsel's request. He further testified that Sechrest was an "incurable sociopath" with an extensive criminal record and a history of drug use.

In front of the jury at the penalty phase, the prosecutor made sure the record showed that defense counsel had acquiesced in the prosecution's request to call Dr. Gerow as a prosecution witness. The prosecutor frequently referred to Dr. Gerow's testimony when examining penalty phase witnesses and when making his closing argument. Moreover, during closing argument, the prosecutor made two additional statements to the jury emphasizing that the Board of Pardon Commissioners could change Sechrest's sentence and that prisoners never serve their full life sentences, even when the life sentence states that it is imposed without the possibility of parole:

> *Statement #3:* Now, the judge has told you that if you return a verdict, whatever verdict you return, he will impose. He also told you, and it is very important under the laws of this state, the State of Nevada, any sentence imposed by the jury may be refused by the State Board of Pardon commissioners. Whatever sentence you return in your verdict this Court will impose that sentence. Whether or not the State Board of Pardon commissioners, upon review, if requested by the defendant, would change that sentence, the Court has no way of knowing. Indeed, you don't either. The State Board of Pardon commissioners, however, would have the power to modify any sentence at a later date. And what that means is, let's say you fall — I am going to talk about his defense. It was a fraud. And let's say you fall for that fraud and you say well, gee, I just can't bring myself to do what I should do, and I am going to impose life without parole. You don't die in prison of old

> age. People get out. Now, are you prepared to risk the life of some other person or child by giving him the opportunity to get out? That will be your risk. That will be your burden.
>
> *Statement #4*: Never getting out. As the judge has instructed you, the pardons board has the ultimate authority to review any sentence, to pardon anybody. If you return a verdict of life without possibility of parole, I represent to you as a lawyer, as an attorney for the people of this county, that the pardons board has the authority to commute that tomorrow if they want to. They won't, of course, but they have the authority to. So don't buy that he is going to go to jail forever. It just doesn't happen.

Defense counsel did not object to these statements.

After closing argument at the penalty phase, the trial judge issued penalty phase jury instructions, which included the following:

> If the penalty is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served.
>
> If the penalty is fixed at life imprisonment without the possibility of parole, the defendant shall not be eligible for parole.
>
> Under the laws of the State of Nevada, any sentence imposed by the jury may be reviewed by the State Board of Pardon Commissioners. Whatever sentence you return in your verdict,

> this Court will impose that sentence. Whether or not the State Board of Pardon Commissioners upon review, if requested by the defendant, would change that sentence, this Court has no way of knowing. The State Board of Pardon Commissioners, however, would have the power to modify any sentence at a later date.

On September 27, 1983, the jury returned its verdict, imposing the death penalty for each of the two murders. The jury found four aggravating factors for each murder: (1) that the murder involved torture, depravity of the mind, or mutilation of the victim; (2) that the murder was committed to prevent or avoid a lawful arrest or to effect an escape from custody; (3) that the murder was committed during the commission or the attempted commission of a kidnaping; and (4) that the murder was committed during the commission or attempted commission of a sexual assault.

The trial judge, in accordance with the jury's verdict, sentenced Sechrest to the penalty of death for each of the two murders. The trial judge also sentenced Sechrest to two terms of life in prison without the possibility of parole for each of the two kidnaping convictions.

PROCEDURAL BACKGROUND

Sechrest appealed his convictions and sentences on several grounds to the Nevada Supreme Court. On August 27, 1985, the Nevada Supreme Court affirmed both his convictions and his sentences. *Sechrest v. State*, 705 P.2d 626 (Nev. 1985).

On November 13, 1985, Sechrest filed a petition for post-conviction relief in the Nevada state district court. Sechrest argued that he was denied effective assistance of counsel during the penalty phase of his trial because his attorney failed to prevent Dr. Gerow from testifying for the prosecution. After conducting an evidentiary hearing on Sechrest's petition on November 8, 1990, the Nevada state district court concluded that counsel's performance had been constitutionally deficient. Nevertheless, the state district court held that Sechrest had failed to demonstrate prejudice and denied the petition. Sechrest appealed the state district court's denial of post-conviction relief to the Nevada Supreme Court, which affirmed the state district court's denial on February 20, 1992. *Sechrest v. State*, 826 P.2d 564 (Nev. 1992).

On August 13, 1992, Sechrest filed a pro se federal petition for a writ of habeas corpus. The district court appointed counsel for Sechrest, and Sechrest filed an amended habeas petition on October 31, 1994. On September 25, 1995, the district court dismissed the amended petition with leave to amend.

On October 27, 1995, Sechrest filed a second amended federal habeas petition raising thirty-five claims of various constitutional violations that occurred during both the guilt and penalty phases of his trial.[2] The district court held that four of Sechrest's claims had been properly exhausted in state court, but

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[2] Several of Sechrest's ineffective assistance counsel claims contained subparts. The district court counted each of these subparts as individual habeas claims.

thirty-one had not. Accordingly, the district court ruled that Sechrest's second amended petition was a "mixed petition," containing both exhausted and unexhausted claims. Because federal law prohibits the consideration of mixed petitions, *Rose v. Lundy*, 455 U.S. 509, 522 (1982), the district court dismissed the second amended petition without prejudice to allow Sechrest to pursue his unexhausted claims in state court.

Sechrest appealed the district court's dismissal of his second amended petition to this court. While that appeal was pending, Sechrest filed a second post-conviction petition in Nevada state court in an attempt to exhaust his unexhausted claims. On September 4, 1996, the Nevada state district court dismissed that petition under Nevada Revised Statute § 34.810 ("NRS 34.810"). NRS 34.810 provides that a petition shall be dismissed if the court determines that the grounds for the petition could have been raised in an earlier proceeding, unless the court finds both cause for the failure to present the grounds earlier and actual prejudice to the petitioner.

On November 20, 1997, the Nevada Supreme Court affirmed the state district court, holding that Sechrest's habeas claims that had not been raised in the earlier state proceedings were procedurally defaulted under NRS 34.810. *Sechrest v. State*, No. 29170 (Nev. Nov. 20, 1997). The Nevada Supreme Court ruled that Sechrest had failed to show good cause for his failure to raise the claims earlier and had failed to demonstrate that his unexhausted claims had any merit. The Nevada Supreme Court concluded that only five of Sechrest's claims had been exhausted during the prior state proceedings: (1) denial of a fair trial because of prosecutorial misconduct regarding

comments on executive clemency, (2) violation of Sixth Amendment right to effective assistance of counsel because of failure of trial court to appoint Sechrest a second attorney, (3) violation of Fifth Amendment right against self-incrimination by admission into evidence of petitioner's statements to police, (4) violation of Fifth Amendment right against self-incrimination because of admission into evidence of Dr. Gerow's testimony, and (5) violation of Sixth Amendment right to effective assistance of counsel because of trial counsel's failure to prevent or prepare for Dr. Gerow's testimony.

Relying on the Nevada Supreme Court's decision, we dismissed Sechrest's appeal of his second amended federal habeas petition. *Sechrest v. Del Papa*, 161 F.3d 14 (Table), 1998 WL 551984 at *2 (9th Cir. Aug. 27, 1998) (unpublished memorandum disposition). Citing *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), we held that the claims deemed procedurally defaulted by the Nevada Supreme Court under NRS 34.810 were outside federal habeas jurisdiction. *Id.* at *1. We remanded Sechrest's second federal petition to the district court, instructing the district court to "vacate its order dismissing the petition, permit [Sechrest] to delete the claims which are procedurally barred, and then proceed to determine the merits of the five [ ]exhausted[3] claims." *Id.* at *2. We noted that if Sechrest "[did] not delete the procedurally barred

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[3] The original disposition inadvertently stated that the district court should "proceed to determine the merits of the five *un*exhausted claims." On September 16, 1998, we filed an order amending our disposition to correct that misstatement. We cite the corrected language above.

claims, then the district court should deny the petition." *Id.*

On remand, the district court ordered supplemental briefing on the procedural default issue. The State objected, arguing that this court had already ruled on that issue. Initially, the district court disagreed with the State and reiterated its request that the parties submit briefing on the procedural default issue. Ultimately, however, the district court agreed with the State and issued an order indicating that it would accept an amended petition from Sechrest "in accordance with the order of the Ninth Circuit Court of Appeals and the Nevada Supreme Court."

Complying with the district court's order, Sechrest filed a third amended federal habeas petition on May 20, 1999, omitting the claims deemed procedurally barred and raising his five remaining claims. On April 19, 2004, the district court issued an order denying on their merits all five claims contained in the third amended habeas petition.

Sechrest filed a motion for reconsideration of the district court's order. In that motion, Sechrest asked the district court to reconsider its ruling on his third amended petition, and to re-evaluate those claims that had been deemed procedurally defaulted. On June 3, 2004, the district court denied Sechrest's motion for reconsideration.

Sechrest then filed an application for a certificate of appealability with the district court. On December 3, 2004, the district court granted the certificate of appealability on four of the five claims raised in Sechrest's third amended federal petition, and on the

correctness of the procedural default ruling. Those issues are before us now.

STANDARD OF REVIEW

Because Sechrest filed his original federal habeas petition before April 24, 1996, AEDPA's standard of review does not apply. *Summerlin v. Schriro*, 427 F.3d 623, 628 (9th Cir. 2005) (en banc). Accordingly, we "simply resolve the legal issue[s] on the merits, under the ordinary rules." *Id.* at 628 (internal quotation and citation omitted). We review the district court's denial of Sechrest's habeas petition de novo and its factual findings for clear error. *Id.* at 628.

DISCUSSION

I.

We begin by deciding whether the claims that the Nevada Supreme Court dismissed under NRS 34.810 were properly barred from federal habeas review. We hold that these claims should not have been barred, and remand so that the district court may consider them on their merits.

A.

[1] Under the principles governing procedural default, a federal district court cannot review a habeas petitioner's claimed denial of a constitutional right if the petitioner failed to present the claim in state court because of a procedural default in that court. *Valerio v. Crawford*, 306 F.3d 742, 773 (9th Cir. 2002) (en banc). "A default under an independent and adequate state procedural rule operates as a bar in federal court

unless the petitioner can show cause for and prejudice from the default." *Id.* (citing *Wainwright*, 433 U.S. at 72; *Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir. 1994)). "[T]o constitute adequate and independent [state] grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells*, 28 F.3d at 1010.

Our 1998 memorandum disposition in this matter held that the claims deemed procedurally defaulted under NRS 34.810 were barred from federal habeas review. 1998 WL 551984 at *2. We recognize that we are generally precluded under the "law of the case" doctrine from reconsidering an issue that has already been decided by the same court in the identical case. *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998). However, we have discretion to depart from a prior decision if "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Minidoka Irrigation Dist. v. U.S. Dep't of Interior*, 406 F.3d 567, 573 (9th Cir. 2005) (quoting *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002)). As we discuss below, this court's 2002 en banc decision in *Valerio* was intervening controlling authority that makes reconsideration of our 1998 memorandum disposition appropriate here.

In *Valerio*, we examined the application of NRS 34.810 under circumstances almost identical to those present here. 306 F.3d 742. After filing an unsuccessful petition for post-conviction relief in Nevada state court in 1990, the petitioner in *Valerio*

filed a federal habeas petition in 1992, which the federal district court dismissed as mixed under *Rose*. *Id.* at 748-49. The petitioner then filed a second state petition for post-conviction relief in Nevada state district court in an attempt to exhaust his unexhausted claims. *Id.* at 749. The state district court dismissed the entire petition as procedurally barred under NRS 34.810, and the Nevada Supreme Court affirmed. *Id.*

The petitioner then returned to federal district court and filed a second federal habeas petition. *Id.* In that petition, he asserted the same claims for relief he had presented to the Nevada state courts in his second petition for post-conviction relief. *Id.* In 1998, the federal district court dismissed most of the petitioner's claims as barred from federal habeas review under NRS 34.810, and the petitioner appealed. *Id.*

On en banc review, we agreed with petitioner that his claims should not have been barred as procedurally defaulted under NRS 34.810 because the Nevada courts had not applied NRS 34.810 "with sufficient clarity and regularity." *Id.* at 773. We noted that NRS 34.810 authorizes the Nevada courts to dismiss claims that could have been raised on direct appeal or in a prior petition for post-conviction relief unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner. *Id.* at 771. Had this rule been regularly adhered to, the Nevada courts should have dismissed *all* claims for post-conviction relief that could have been brought in an earlier petition. Our in-depth review of Nevada case law, however, revealed that, when the petitioner in *Valerio* filed his first petition for post-conviction relief in 1990, the Nevada Supreme Court had a policy in capital

cases of "exercising discretionary *sua sponte* power to overlook failures to present constitutional claims in earlier proceedings." *Id.* at 776. Because the Nevada Supreme Court exercised a "general discretionary power" to address defaulted constitutional claims in capital cases, the Nevada Supreme Court did not "adhere regularly" to the requirements of NRS 34.810. *Id.* at 778.

[2] We therefore concluded that NRS 34.810 was an inadequate state procedural bar to federal habeas review. *Id.* We explicitly noted that this conclusion comported with our decisions in *Petrocelli v. Angelone*, 248 F.3d 877 (9th Cir. 2001), and *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995), which held that the Nevada courts had inconsistently applied NRS 34.810 as early as 1985, in both direct appeal and habeas proceedings. *Id.*

[3] *Valerio* controls the outcome of the procedural default issue in this case. Here, Sechrest's default occurred on November 13, 1985, when he filed his first petition for post-conviction relief in the Nevada state district court. *See id.* at 776 (explaining that default occurs at the time the first petition for post-conviction relief is filed). *Valerio* demonstrates that, in 1985, there was no clear, consistently applied, and well-established rule that barred Sechrest from asserting in a later petition claims that he failed to assert in his first petition. *Id.* at 778. Therefore, NRS 34.810 is inadequate to bar federal habeas review of the claims deemed procedurally defaulted by the district court.

[4] Because we conclude that our earlier procedural default ruling, 1998 WL 551984 at *2, should not

stand, we must now decide whether "jurists of reason would find it debatable" whether the defaulted claims stated valid "denial[s] of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). To do so, we simply take a "quick look" at the face of the petition. *Petrocelli*, 248 F.3d at 885 (citations omitted).

Here, our "quick look" reveals that all the defaulted claims alleged the denial of a constitutional right. In his second amended petition, Sechrest raised several Sixth Amendment ineffective assistance of counsel claims for errors that occurred during the guilt and penalty phases of his trial. He also argued that death by lethal injection violates the Eighth Amendment's prohibition against cruel and unusual punishment. These claims clearly state potential constitutional violations.

Furthermore, Sechrest challenged the constitutionality of the four aggravating factors that the jury considered when sentencing him to death. We have already held in *Valerio* that one of these aggravating factors—the "depravity of mind" factor—is unconstitutionally vague. 306 F.3d at 750-51; *see also Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir. 1989), *vacated on other grounds sum nom., Angelone v. Deutscher*, 500 U.S. 901 (1991). Moreover, the Nevada state district court has since held that the two "felony-murder" aggravating factors applied in Sechrest's case—that the murder was committed during the commission or the attempted commission of a kidnaping, and that the murder was committed during the commission or attempted commission of a sexual assault—"must be stricken as invalid" under *McConnell v. State*, 102 P.3d 606 (Nev. 2004). *Sechrest v. McDaniel*, Second Judicial Dist. Ct., Case No.

C83-1014 (Apr. 5, 2007) (unpublished order). Therefore, at least one (and possibly three) of Sechrest's dismissed claims is not only a constitutional claim; it is meritorious.

[5] Sechrest has shown that the dismissed claims alleged potential denials of his constitutional rights. Accordingly, we conclude that those claims should not have been barred from federal habeas review.

B.

The State does not dispute the application of *Valerio* to Sechrest's case. Instead, the State contends that Sechrest waived the procedural default issue when he filed a third amended federal habeas petition omitting the supposedly defaulted claims.

[6] Generally, amendment of a complaint or petition constitutes waiver of any omitted arguments or claims from previous versions of the complaint or petition. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997). The filing of a new petition cancels out and waives any claims from the old petition. The cases establishing these rules, however, all deal with *voluntary* waiver. *See, e.g., London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981); *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). This is not such a case. In our 1998 memorandum disposition, we held that Sechrest's claims were procedurally barred from federal habeas review. 1998 WL 551984 at *2. We specifically stated that if Sechrest failed to delete these claims, his entire petition should be denied. *Id.* Complying with our mandate, the district court required Sechrest to file a third amended federal habeas petition "in accordance with the order of the

Ninth Circuit Court of Appeals and the Nevada Supreme Court." Thus, Sechrest had to delete the defaulted claims, on pain of having his entire habeas petition denied. Under such circumstances, we cannot conclude that he voluntarily waived his claims.[4] *See, e.g., Wilson v. First Houston Inv. Corp.*, 566 F.2d 1235, 1238 (5th Cir. 1978), *vacated on other grounds*, 444 U.S. 959 (1979) ("It . . . is not logical to deny a party the right to appeal simply because he decides to abide by the court's order and amend his pleading rather than allowing judgment to be entered against him . . . .").

[7] We also find that the doctrine of judicial estoppel prevents the State from prevailing in its waiver argument. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) ("Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position."). In district court, the State successfully argued that Sechrest was bound by the terms of our prior decision to *delete* the defaulted claims. The State cannot now argue that Sechrest was at liberty to *include* those same claims in his third amended federal habeas petition.

Finally, we reject the State's argument that Sechrest did not raise the procedural default issue in a timely manner because he first addressed it in a

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[4] We note that our ruling requiring the deletion of procedurally defaulted claims was incorrect. Unexhausted claims must be deleted, not procedurally defaulted claims. *See Valerio*, 306 F.3d at 770.

motion for reconsideration. Sechrest had already raised the procedural default issue in this court. The State was well aware of the issue and suffered no prejudice when Sechrest raised it in his motion for reconsideration

[8] We conclude that the habeas claims the Nevada Supreme Court dismissed under NRS 34.810 should not have been barred from federal review. We reverse and remand to the district court for consideration of those claims on the merits.[5]

II.

We next address Sechrest's claims challenging the validity of his conviction. Sechrest argues that the Reno police officers violated his *Miranda* right to remain silent and his *Miranda* right to counsel when they questioned him at the Sparks police station on July 14, 1983.[6] Sechrest contends that his confession was therefore the product of compulsion and should not have been admitted into evidence at trial.

Miranda claims present mixed questions of law and fact which we review de novo. *See Thompson v. Keohane*, 516 U.S. 99, 106-16 (1995). We hold that

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[5] As we later conclude, for separate reasons, that there were due process violations during the penalty phase of the trial, the claims that go to due process violations in sentencing need not be revisited. We remand for consideration of the other claims dismissed under NRS 34.810.

[6] Sechrest concedes that he waived his *Miranda* rights when he chose to speak with the Sparks officers about the grand larceny charge.

Sechrest's *Miranda* rights were not violated and affirm the district court on this issue.

A.

Sechrest first argues that the Reno officers violated his right to remain silent. A suspect in police custody must be informed of his right to remain silent before any interrogation begins. *See Miranda*, 384 U.S. at 444. If the suspect indicates in any manner, at any time prior to or during questioning, that he wishes to invoke his right to remain silent, the interrogation must cease. *Id.* at 474. Any statement taken after the suspect's invocation of this right constitutes the product of compulsion and cannot be used as proof of guilt. *Id.*

However, "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants [to invoke the privilege]." *Davis v. United States*, 512 U.S. 452, 461 (1994). Clarifying questions "minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement." *Id.* "If the suspect's statement is not an [ ] unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning." *Id.* at 461-62.

[9] When the Sparks officers finished questioning Sechrest, Sergeant Gonyo asked Sechrest if he would like to talk to Reno Police Officer Bogison, and Sechrest answered that he would. When Officer Bogison first approached Sechrest, however, Sechrest told Officer Bogison that his lawyer had advised him to "keep his mouth shut." This statement was not a

clear invocation of the right to remain silent. Although Sechrest was indicating what his lawyer had advised him to do, it was not clear that Sechrest was explaining his own intentions. An officer in Bogison's position would not necessarily have understood Sechrest's statement to be an invocation of his right to remain silent.

After Sechrest announced that his lawyer had advised him to "keep his mouth shut," Officer Bogison asked a second time if Sechrest wanted to talk to him. Because Sechrest's statement about his attorney's advice was sufficiently vague to merit clarification, this question was permissible.

Sechrest responded to Officer Bogison's question with an ambiguous, convoluted statement. Sechrest said, "I will tell you what, I will make a deal—no, I won't make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won't." Once again, Sechrest's intentions were unclear. Officer Bogison asked again whether Sechrest wished to speak with him, and Sechrest said "yes." This last statement constituted a clear indication that Sechrest did not wish to invoke his right to remain silent.

[10] In sum, each of Officer Bogison's questions merely sought to clarify whether Sechrest was invoking his right to remain silent, and Sechrest eventually made clear that he did not wish to invoke that right. We therefore conclude that Sechrest knowingly and voluntarily waived this right before he agreed to speak with the Reno police officers.

B.

Sechrest also argues that the Reno officers violated his right to counsel under *Miranda*. "The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations . . . that it 'requir[es] the special protection of the knowing and intelligent waiver standard.' " *Davis*, 512 U.S. at 458 (quoting *Edwards v. Arizona*, 451 U.S. 477, 483 (1981)). If a suspect waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. *Id.* "But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Id.* A suspect who invokes his right to counsel cannot be questioned about any offense unless an attorney is actually present. *Id.*

Applying these rules, we begin by determining whether Sechrest actually invoked his right to counsel. *Smith v. Illinois*, 469 U.S. 91, 95 (1984). This is an objective inquiry. *Davis*, 512 U.S. at 458-59. There must, at a minimum, be a statement from the suspect that can "reasonably be construed to be an expression of a desire for the assistance of an attorney." *Id.* at 459 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)). Where a suspect makes a reference to an attorney that is ambiguous or equivocal, the officers may continue with their questioning. The suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459.

[11] When Officer Bogison first began questioning Sechrest, Sechrest said that he had spoken with his attorney and had been advised to "keep his mouth shut." This mention of an attorney and reference to advice from an attorney is not an unambiguous request for counsel. In *Davis*, the Supreme Court examined a case where the suspect said, "Maybe I should talk to a lawyer." *Id.* at 455. The Court found that this reference to an attorney was not a clear invocation of a right to an attorney. *Id.* at 462. We have also held that the statements, "I think I would like to talk to a lawyer," and, "maybe [I] ought to see an attorney" were not clear and unambiguous requests for counsel. *Clark v. Murphy*, 331 F.3d 1062, 1070-71 (9th Cir. 2003); *United States v. Doe*, 60 F.3d 544, 546 (9th Cir. 1995). Because Sechrest's reference to his attorney's advice was even less clear than these statements, it was insufficient to require that the officers stop their questioning.

Sechrest did make a later statement that was a request for counsel. After Sechrest agreed to speak to Officer Bogison and Detective Eubanks, Sechrest asked permission to telephone his grandmother and his attorney. Sechrest decided to call his grandmother first, however. After Sechrest's conversation with his grandmother, Officer Bogison asked Sechrest if he was going to call his attorney, but Sechrest said no. In context, Officer Bogison's question was simply an attempt to follow up on and implement Sechrest's earlier request, after a delay instigated by Sechrest. Under these specific circumstances, we find Officer Bogison's question permissible.

[12] Accordingly, we conclude that Sechrest's right to counsel was not violated when the Reno officers questioned him at the Sparks police station.

III.

We now address Sechrest's claims challenging the validity of his death sentences. Sechrest raises three alternative claims which, if meritorious, will require the State to resentence him. We consider each claim in turn.

A.

First, Sechrest argues that the prosecutor's statements regarding the likelihood of Sechrest's release from prison by parole misled the jury and violated his Sixth and Fourteenth Amendment due process right to a fair trial.

[13] A prosecutor's misleading and inflammatory arguments may violate a defendant's due process right to a fair trial. *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986). On federal habeas review, the narrow issue before us is whether the prosecutor's comments violated the defendant's due process right to a fair trial, not whether the prosecutor's comments constituted misconduct committed while the prosecutor was under the court's "exercise of supervisory power." *Id.* at 181.

Thus, we must examine the " 'entire proceedings' to determine whether the prosecutor's remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991) (per curiam)

(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Before granting relief, we must also determine that any constitutional error was not harmless. Specifically, we must find that the error "had substantial and injurious effect or influence in determining the jury's verdict."[7] *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Only if the record demonstrates that the jury's decision was substantially influenced by the error or there is " 'grave doubt' about whether an error affected a jury" will Sechrest be entitled to relief. *Hegler v. Borg*, 50 F.3d 1472, 1478 (9th Cir. 1995) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995)).

After examining the entire record, we hold that the prosecutor's repeated misstatements regarding the likelihood of Sechrest's release from prison by parole were he to be sentenced to life without the possibility of parole violated Sechrest's due process right to a fair trial, and that the violation had substantial and injurious effect on the jury's sentencing decision, carried out by the trial judge, to impose the death penalty. Accordingly, Sechrest must be resentenced.

1.

Sechrest argues that the prosecutor's uncorrected assertions that the Board of Pardon Commissioners would likely release Sechrest if he did not receive the

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[7] Here, Sechrest argues that the improper statements affected *not* his guilty verdict, but the jury's decision to impose the death penalty. Therefore, our review focuses on the jury's sentencing decision.

death penalty were constitutionally impermissible. We agree.

During Sechrest's trial, the prosecutor made four statements indicating that the Board of Pardon Commissioners could—and likely would—release Sechrest if the jury returned a verdict that did not impose the death penalty. We repeat the prosecutor's statements:

Statements Made During Voir Dire

Statement #1: The judge is going to give you an instruction at the penalty phase, if we get there, that he will impose the penalty that you say, *but if you say life in prison without parole, that doesn't mean that the pardons board can't let him out. Now, would you consider that when you arrive at your verdict?*

Statement #2 : Okay. Now, [defense counsel] has talked a lot about the possible penalties if we get there being life with possibility of parole, life without possibility of parole and death. *And His Honor will, I imagine, because many times I have been in front of His Honor, will give you a charge, a jury instruction saying if you impose life without parole that really doesn't mean life forever. If he gives you that charge, will you take that into consideration in deciding what the verdict ought to be?*

Statements Made During Closing Argument of the Penalty Phase

Statement #3: Now, the judge has told you that if you return a verdict, whatever verdict you return, he will impose. *He also told you, and it is very important under the laws of this state, the State of Nevada, any sentence imposed by the jury may be refused by the State Board of Pardon commissioners.* Whatever sentence you return in your verdict this Court will impose that sentence. *Whether or not the State Board of Pardon commissioners, upon review, if requested by the defendant, would change that sentence, the Court has no way of knowing. Indeed, you don't either. The State Board of Pardon commissioners, however, would have the power to modify any sentence at a later date. And what that means is, let's say you fall — I am going to talk about his defense. It was a fraud. And let's say you fall for that fraud and you say well, gee, I just can't bring myself to do what I should do, and I am going to impose life without parole. You don't die in prison of old age. People get out. Now, are you prepared to risk the life of some other person or child by giving him the opportunity to get out? That will be your risk. That will be your burden.*

Statement #4: Never getting out. As the judge has instructed you, *the pardons board has the ultimate authority to review any sentence, to pardon anybody. If you return a verdict of life without possibility of parole, I represent to you as a lawyer, as an attorney for the people of this county, that the pardons board has the authority*

> *to commute that tomorrow if they want to. They won't, of course, but they have the authority to. So don't buy that he is going to go to jail forever. It just doesn't happen.*

(Emphases added.)

In making these false, inflammatory statements, the prosecutor violated Sechrest's due process right to a fair trial.

[14] First, the prosecutor repeatedly misled the jurors by suggesting that a decision by the Board of Pardon Commissioners could (and likely would) free Sechrest if the jury did not return a verdict imposing the death sentence. The prosecutor claimed that the Board of Pardon Commissioners had the "ultimate authority" to commute a verdict of life in prison without the possibility of parole "tomorrow." The prosecutor told the jury, "You don't die in prison of old age. People get out." He then warned the jury not to "buy that [Sechrest] is going to jail forever. It just doesn't happen."[8]

[15] The prosecutor's statement that no individual sentenced to life imprisonment "is going to go to jail forever. It just doesn't happen," is patently false. The prosecutor presented no evidence to back up this outlandish statement. Thus, this statement constituted improper testimony. *See, e.g., United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978) (explaining that an attorney "may not inject into his

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[8] We note that the district court found that these false statements constituted error.

argument any extrinsic or prejudicial matter that has no basis in the evidence" because such improper "testimony" will "increase the apparent probative force of [the attorney's argument] by virtue of his personal influence, his presumably superior knowledge of the facts and background of the case, and the influence of his official position.").

Moreover, the prosecutor's assertion that the actions of the Board of Pardon Commissioners could ultimately result in Sechrest's release was not true under existing Nevada law. When Sechrest was tried in 1983 for committing the two murders, the power of the Board of Pardon Commissioners to commute a sentence of life *without* the possibility of parole to a sentence of life *with* the possibility of parole was severely curtailed under Nevada Constitution Article 5, section 14(2).[9] Thus, the prosecutor's suggestion that

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[9] In 1982, article 5, section 14(2) was added to the Nevada Constitution. Article 5, section 14(2) reads as follows:

> Except as may be provided by law, a sentence of death or a sentence of life imprisonment without possibility of parole may not be commuted to a sentence which would allow parole.

Thus, the plain language of Article 5, section 14(2)—in effect at the time of Sechrest's trial in 1983—indicates that the Board of Pardon Commissioners could not commute a sentence of life without the possibility of parole.

Despite this plain language, the Nevada Supreme Court held in 1990 that the Board of Pardon Commissioners *did* retain limited power to make such a commutation. *See Smith v. State*, 802 P.2d 628 (Nev. 1990). Though the decision in *Smith* was issued seven years after Sechrest's trial, it does not appear to announce "new" law. Rather, it appears that *Smith* merely

the Board of Pardon Commissioners could easily commute a sentence of life imprisonment without the possibility of parole was false.

More importantly, Sechrest was on probation at the time he committed the two murders in 1983. Under Nevada law in effect at the time of Sechrest's offense (and still in effect today), an individual who is on probation at the time he commits another offense—here, the two murders—is not eligible for parole by the Parole Board on that offense. *See* Nev. Rev. Stat. § 213.1099(4)(e) ("NRS 213.1099(4)(e)") (prohibiting the reduction of a sentence to one allowing parole if the convicted individual had "[failed] in parole, probation, work release or similar programs"). The Nevada Supreme Court has held that NRS 213.1099(4)(e) applies even in situations where the Board of Pardon Commissioners commutes a sentence of life without the possibility of parole to a sentence allowing for parole. *See Smith v. State*, 802 P.2d 628, 630 (Nev. 1990) (explaining that while "the board of pardons retains the power to commute a sentence of life without the possibility of parole to a sentence allowing for parole," the "parole board [remains] subject to the restrictions of NRS 213.1099(4)(e)," and therefore cannot grant parole to those who were on probation at the time of their offenses, even if their

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clarified the law in effect at the time Article 5, section 14(2) was enacted in 1982.

For this reason, we cannot hold, as Sechrest argues, that the Board of Pardon Commissioners entirely lacked the power under the plain language of Article 5, section 14(2), to commute Sechrest's sentence at the time of his trial in 1983—although, as we next explain, it did lack that power for a different reason.

sentences have been commuted by the Board of Pardon Commissioners).

[16] Thus, even if Sechrest had received sentences of life without the possibility of parole for the two murders, and the Board of Pardon Commissioners later commuted those sentences to life with the possibility of parole, the Parole Board would not have had the power to release Sechrest because he was on probation when he committed the two murders in 1983.[10] That was the law in Nevada at the time of Sechrest's trial, and it is the law that remains in effect today. Accordingly, contrary to the prosecutor's repeated assertions, the Board of Pardon Commissioners *did not* have the power to parole Sechrest.

The prosecutor compounded the damaging effect of his erroneous assertions by "representing" to the jury that "as a lawyer, as an attorney for the people of this county," "the pardons board has the authority to commute [a sentence of life without possibility of parole] tomorrow if they want to." As the Supreme Court has observed, a "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985). By vouching for the truthfulness of his *own* unsupported,

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[10] Though Sechrest presents his argument regarding NRS 213.1099(4)(e) for the first time on appeal, the district court addressed it *sua sponte* below. Because the district court decided the question on the merits, we may review it. *See Cadillac Fairview of Cal. Inc. v. United States*, 41 F.3d 562, 565 n.3 (9th Cir. 1994).

inaccurate assertions, the prosecutor committed flagrant misconduct. *Cf. United States v. Molina*, 934 F.2d 1440, 1444-45 ("As a general rule, a prosecutor may not express . . . belief in the credibility of government witnesses. Such prosecutorial vouching, which consists of either placing the prestige of the government behind the witnesses through personal assurances of their veracity or suggesting that information not presented to the jury supports the witnesses' testimony, is improper.") (citation omitted).

Additionally, the prosecutor inflamed the passions of the jury by calling the defense a "fraud," and telling the jurors that if they "[fell] for that fraud," they would be "risk[ing] the life of some other person or child." The prosecutor told the jury, "[t]hat will be your risk. That will be your burden." We have held that similar inflammatory comments violate a criminal defendant's right to a fair trial. *See United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir. 1999) (holding that the prosecutor committed misconduct "denigrating the defense as a sham"); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (per curiam) (describing the prosecutor's statement that maybe next time the victim "will be someone you know" as "highly inflammatory and wholly impermissible").

In short, the prosecutor's statements were inflammatory, unsupported, and inaccurate. Significantly, neither defense counsel nor the trial judge did anything to stop the prosecutor from making these statements.[11]

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[11] The State cites *Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991) (per curiam) for the proposition that Sechrest's due process

To make matters worse, the trial judge gave the jury an instruction that increased the risk that the prosecutor's misconduct would affect the jury's verdict. In relevant part, the trial judge instructed the jury:

> Under the laws of the State of Nevada, any sentence imposed by the jury may be reviewed by the State Board of Pardon Commissioners. Whatever sentence you return in your verdict, this Court will impose that sentence. *Whether or not the State Board of Pardon Commissioners upon review, if requested by the defendant, would change that sentence, this Court has no way of knowing. The State Board of Pardon Commissioners, however, would have the power to modify any sentence at a later date.*

(Emphasis added.)

Jury instructions that describe commutation may be appropriate where those instructions are accurate. *California v. Ramos*, 463 U.S. 992, 1004 (1983). However, an instruction that is accurate in the abstract can nonetheless violate the Constitution if it

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claim is procedurally barred under Nevada law from federal habeas review because defense counsel failed to object during voir dire and during closing argument to the prosecutor's misleading assertions. But the Nevada Supreme Court addressed Sechrest's due process claim on the merits, not treating it as procedurally barred, so we may do so as well. *See Wood v. Alaska*, 957 F.2d 1544, 1549 (9th Cir. 1992).

Additionally, as noted below, we hold that Sechrest's counsel provided him with ineffective assistance. It is therefore unsurprising that defense counsel failed to object to the prosecutor's blatantly inappropriate remarks.

inaccurately describes the possibility of clemency on the facts of the defendant's case. *Coleman v. Calderon*, 210 F.3d 1047, 1050-51 (9th Cir. 2000) (noting that the prosecutor's argument on the necessity of imposing a death sentence exacerbated the prejudice of a misleading jury instruction on executive clemency); *Gallego v. McDaniel*, 124 F.3d 1065, 1074-77 (9th Cir. 1997) (finding that Nevada's instruction on the possibility of executive clemency was misleading because the defendant was under the sentence of death in another jurisdiction, yet Nevada's instruction implied that early parole was available for the defendant). Furthermore, the need for accurate jury instructions is heightened where, as in this case, the prosecution argues the issue of a defendant's future dangerousness. *E.g.*, *Simmons v. South Carolina*, 512 U.S. 154, 163-66 (1994) (explaining that inaccurate instructions about parole eligibility may deprive a defendant of due process when the defendant's future dangerousness is at issue).

Here, the jury instruction reinforced the prosecutor's argument that the Board of Pardon Commissioners was the entity responsible for deciding Sechrest's term of imprisonment. The jury instruction emphasized that the Board of Pardon Commissioners had the "power to modify any sentence" and that the court had "no way of knowing" whether the Board of Pardon Commissioners would do so. When combined with the prosecutor's assertion that "the pardons board has the ultimate authority to review any sentence, to pardon anybody," the jury instruction contributed to the false impression that the Board of Pardon Commissioners could free Sechrest if he were not sentenced to death. Because the jury instruction invited the jury to accept the prosecutor's speculation

"that the only way [the jury] could be assured [that Sechrest] would not be released would be to sentence him to death," it exacerbated, rather than corrected, the inaccurate effect of the prosecutor's arguments. *Coleman*, 210 F.3d at 1051.

[17] Bottom line: the prosecutor misled the jurors to believe that if they did not impose the death penalty, Sechrest could be released on parole and would kill again. In making his erroneous assertions, the prosecutor gave improper testimony, used his position as an attorney "for the people" to vouch for that improper testimony, and most likely inflamed the passions of the jury. The trial judge did nothing to stop the prosecutor from making these erroneous assertions. Instead, the trial judge gave a jury instruction that validated the prosecutor's false and inflammatory statements. In these circumstances, we conclude that the prosecutor committed misconduct rising to the level of constitutional error.

2.

We must now decide whether the constitutional error prejudiced Sechrest. Our prejudice inquiry focuses on the totality of the effect of the error. *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000) (reviewing the "entire postconviction record" in conducting a prejudice inquiry). We review the "entire proceedings" to determine whether the prosecutor's misleading remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Hall*, 935 F.2d at 165 (quotation omitted). We hold that they did.

[18] A jury sitting in a capital case must be given a clear choice between the death penalty and a life sentence. *See Coleman v. Calderon*, 150 F.3d 1105, 1118 (9th Cir.), *rev'd on other grounds*, 525 U.S. 141 (1998) (noting "the Supreme Court's emphasis on the importance of accuracy in the description of sentencing alternatives in a death penalty proceeding"). Here, the jury was not given that choice. The prosecutor repeatedly told the jury that Sechrest would be released if he did not receive the death penalty. The trial judge did nothing to stop the prosecutor from making this false representation, and gave a jury instruction that confirmed it. Finally, the prosecutor told the jurors that they would be "risk[ing] the life" of "some other child" if they did not sentence Sechrest to death. Accordingly, we hold that the prosecutor's misconduct, combined with the court's inaccurate jury instruction, had a substantial and injurious effect on the jury's decision to impose the death penalty on Sechrest.

[19] Though the prosecutor's misconduct alone justifies this holding, we note that Dr. Gerow's testimony exacerbated the prejudicial effect of the prosecutor's remarks.[12] Dr. Gerow was the

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[12] Like the district court, we recognize the "interplay" between Sechrest's due process claim and his ineffective assistance of counsel claim concerning the admission of Dr. Gerow's testimony. As discussed below, we hold that Sechrest's counsel provided him with ineffective assistance by allowing the State to call Dr. Gerow as a penalty phase witness. We note, however, that even if counsel's performance was *not* ineffective in this regard, we would still consider the impact of Dr. Gerow's damaging testimony in examining the entire proceedings to determine the totality of the effect of the prosecutor's misleading and inflammatory argument.

prosecution's primary penalty phase witness. After stating that he had examined Sechrest at *defense* counsel's request, Dr. Gerow testified that Sechrest had an extensive criminal history that included burglary, possession of stolen property, and possession of narcotics. Dr. Gerow further testified that Sechrest had a "callous disregard for human life" and was an incurable sociopath who, if released, would pose a danger to others, particularly to little girls. Dr. Gerow's testimony that Sechrest was extremely dangerous and could not be rehabilitated likely had a substantial influence on the jury's decision to sentence Sechrest to death.

[20] In reaching this conclusion, we depart from the state post-conviction court's and the district court's analysis of Dr. Gerow's testimony. Both courts theorized that Dr. Gerow's testimony, though extremely harmful to Sechrest, was "cumulative," putting nothing new before the jurors that they did not already know. In so theorizing, both courts neglected to recognize the significance of Dr. Gerow's role as a mental health expert. As the Supreme Court has explained:

> [P]sychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder or behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. . . . Unlike lay witnesses, who merely describe symptoms they believe

> might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

Ake v. Oklahoma, 470 U.S. 68, 80-81 (1985) (citations omitted). Dr. Gerow's testimony cannot be considered merely "cumulative" because of his role as the only medical doctor to discuss Sechrest's criminal past and pathology during the penalty phase. While other lay witnesses may have touched on some of the same points that were presented by Dr. Gerow, only Dr. Gerow had the education and experience necessary to evaluate Sechrest's dangerousness. Thus, his opinion carried more credibility. Dr. Gerow's connection with the defense, and his inability to say anything positive or even mitigating about Sechrest, meant that the prosecutor's misleading remarks and the erroneous jury instruction likely had particular impact on the jury.

The State contends that the prosecutor's misconduct did not directly relate to one of the statutory aggravating and mitigating factors presented

to the jury, and therefore played no role in the jury's sentencing decision. The State's contention is misguided: the question of prejudice focuses on the totality of the effect of the error, *Williams*, 529 U.S. at 398, not whether the error relates directly to an aggravating or mitigating factor. Moreover, under Nevada law, the jury has the power to impose a sentence less than death regardless of the weight of aggravation or the total lack of mitigation. *Evans v. State*, 28 P.3d 498, 515 (Nev. 2002); *Bennett v. State*, 787 P.2d 797, 803 (Nev. 1990), *overruled on other grounds by Leslie v. Warden*, 59 P.3d 440 (Nev. 2002). Accordingly, the fact that the prosecutor's arguments did not directly relate to an aggravating factor is not determinative of our prejudice inquiry.[13]

Furthermore, the only mitigating factor offered by the defense—Sechrest's lack of a violent criminal past, with the implication that he was unlikely to be dangerous in prison—*was* in fact affected by the prosecutor's misconduct. The prosecutor argued and improperly vouched that Sechrest would be released and would kill again if he was not sentenced to death. The jury was more likely to believe that argument

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[13] In addition, we have already explained that three of the four aggravating factors have since been held unconstitutional. *Supra* at 15993. Thus, it is virtually certain that on remand, the district court will strike some, if not all, of the aggravating factors as invalid. Although we do not consider the invalidity of those aggravating factors as part of our prejudice analysis, we note that the aggravating factors undoubtedly had a substantial and injurious effect on the jury's imposition of the death penalty. Indeed, as the district court conceded, "the most important considerations informing the sentencing decision must have been the aggravating circumstances relating to the nature of the crimes."

after hearing Dr. Gerow testify that Sechrest had an extensive criminal history and was an "incurable sociopath" who posed a danger to little girls.

Finally, the State argues that because Sechrest's crime was one "of utter depravity—unthinkable by most people in the abstract," we would "demean both *Brecht* and the jury that sentenced Sechrest to death" if we held that the constitutional violation prejudiced Sechrest. This argument, however, is analogous to the argument that the Supreme Court condemned in *Godfrey v. Georgia*, 446 U.S. 420 (1980). In *Godfrey*, the Supreme Court reviewed an affirmation of a death sentence "based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' " 446 U.S. at 428. The Supreme Court reversed, reasoning that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' " *Id.* at 428-29.

In short, all first degree murders can be described as "unthinkable." Merely labeling them as such does not mean that all jurors will find that they warrant the death penalty, nor does the label relieve us of our duty to determine whether the constitutional errors that occurred in this case deprived Sechrest of a fair trial.

[21] We conclude that, when viewed against the background of the entire proceedings, including Dr. Gerow's testimony and the misleading jury instruction, the prosecutor's erroneous and inflammatory

assertions had a substantial and injurious effect in determining the jury's sentencing verdict. Because Sechrest was deprived of his due process right to a fair penalty phase trial, he must be resentenced.

B.

Next, Sechrest argues that his trial counsel provided him with ineffective assistance by allowing the prosecution to call Dr. Gerow as a penalty phase witness. We address this issue because it is connected to and throws additional light on the prosecutorial misconduct question, and because it may be pertinent if the penalty phase is retried. We emphasize, however, that our prosecutorial misconduct ruling is an independent basis for reversing the penalty phase judgment.

A defendant's Sixth Amendment right to representation in a criminal trial includes the right to effective assistance of counsel. *Duncan v. Ornoski*, 528 F.3d 1222, 1233 (9th Cir. 2008). Claims of ineffective assistance of counsel are mixed questions of law and fact which we review de novo. *Beardslee v. Woodford*, 358 F.3d 560, 569 (9th Cir. 2004). Though state court findings of fact are entitled to deference, we reserve the right to give different legal weight to such facts. *See Reiger v. Christensen*, 789 F.2d 1425, 1428 (9th Cir. 1986).

To succeed on his ineffective assistance of counsel claim, Sechrest must show that (1) his trial counsel's performance "fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).[14]

We hold that Sechrest has met both *Strickland* requirements. He is entitled to resentencing on this alternative ground for relief.

1.

Under *Strickland*, counsel's competence is presumed. *Id.* at 689. To rebut this presumption, Sechrest must demonstrate that his counsel's performance was unreasonable under prevailing professional norms and was not the product of sound strategy. *Id.* at 688-89. We consider counsel's performance deficient if it falls outside the range of competence demanded of attorneys in criminal cases. *Turner v. Calderon*, 281 F.3d 851, 879 (9th Cir. 2002).

Here, for three main reasons, we hold that counsel's representation of Sechrest fell far outside the range of competence demanded of an attorney representing a criminal defendant who is facing the death penalty.

[22] First, counsel should not have allowed the prosecution to review Dr. Gerow's confidential report on Sechrest's mental health. Dr. Gerow evaluated Sechrest two months before trial at defense counsel's request. After reviewing Dr. Gerow's report and discussing it with Dr. Gerow, Sechrest's counsel decided not to call Dr. Gerow as witness for the defense. Inexplicably, however, counsel disclosed Dr.

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[14] The requirements of *Strickland* apply to sentencing. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977).

Gerow's confidential and privileged report to the prosecution. The report contained information about Sechrest's criminal history and his upbringing that Sechrest had revealed only to Dr. Gerow. The report also contained Dr. Gerow's diagnosis that Sechrest had a "polymorphous perversion."

Without Dr. Gerow's report, the prosecution would not have had access to this privileged information. More importantly, defense counsel had absolutely no obligation to disclose Dr. Gerow's confidential report to the prosecution. By allowing the prosecution to review and introduce into evidence Dr. Gerow's report on Sechrest, defense counsel performed deficiently.

[23] Second, Sechrest's counsel should not have stipulated to the prosecutor calling Dr. Gerow *as a witness for the prosecution*. Counsel's decision to so stipulate is indefensible. This decision put counsel in the difficult position of having to cross-examine the only mental health expert to testify during the penalty phase of Sechrest's trial, even though counsel himself had chosen Gerow and supplied him with information about Sechrest. Furthermore, the jury was told that Dr. Gerow was hired by the *defense* to examine Sechrest and report on his mental health. Given that the defense's expert not only had nothing favorable to say about Sechrest, but thought that he was beyond all hope of rehabilitation, the jurors had even less incentive to impose a sentence that they were told by the prosecutor and the court might lead to Sechrest's eventual release.

At the November 8, 1990 state court evidentiary hearing on this issue, Sechrest's counsel took the stand and testified that he did not object to the prosecutor

calling Dr. Gerow as a witness because counsel believed that Dr. Gerow would provide helpful information about Sechrest's troubled background. This explanation does not indicate a sound strategic decision. *Strickland*, 466 U.S. at 688-89. If counsel truly believed that Dr. Gerow's testimony would be helpful, the appropriate "strategic decision" would have been to call Dr. Gerow to testify on behalf of the defense. Instead, counsel did just the opposite. Furthermore, counsel did not pursue or argue any mitigating factors related to Sechrest's troubled background. Given these considerations, counsel cannot hide behind a later, implausible assertion that his decision was "tactical" given that his actions show that he had no intention of presenting any mitigating evidence based on Sechrest's mental health.[15]

[24] Third, counsel's level of preparation for Dr. Gerow's testimony fell far below an objective standard of reasonableness. Once counsel decided to allow the prosecution to call Dr. Gerow as a witness, counsel had a duty to prepare for Dr. Gerow's testimony. "Preparing for the penalty phase of a capital trial is the equivalent of preparing for an entirely new trial, and trial counsel must treat it as such." *Turner*, 281 F.3d at 891. Here, counsel did not speak with Dr. Gerow after agreeing to let him testify for the

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[15] We are aware that the district court found that counsel's decision to allow the prosecution to call Dr. Gerow to the stand was "made with the benefit of adequate information." The district court's finding, however, is not supported by the record. Though the district court found that counsel talked to Dr. Gerow on "at least three occasions," the record reflects that each of these conversations occurred nearly two months *before* counsel decided to allow the prosecution to call Dr. Gerow as its witness.

prosecution. Counsel's lack of preparation for Dr. Gerow's testimony is evident from counsel's lackluster performance at trial. During his cross-examination of Dr. Gerow, counsel asked several questions about whether Sechrest could be cured and whether counseling could help Sechrest. In response, Dr. Gerow described any such efforts as "absolutely fruitless" and stated that Sechrest's case was a hopeless one.

In sum, some of the most damaging testimony presented during the penalty phase of trial was elicited by Sechrest's own counsel, from a witness Sechrest's counsel had originally selected and could have prevented from testifying. Indeed, as the state post-conviction court observed, "the 'balance' of Dr. Gerow's testimony [did] not favor Mr. Sechrest. It favor[ed] the State." Unsurprisingly, Sechrest's counsel admitted at the state court evidentiary hearing that Dr. Gerow's testimony was damaging and that counsel was unhappy with it. Had counsel adequately prepared for his cross-examination of Dr. Gerow, he would not have asked questions that elicited such negative answers.

[25] For the foregoing reasons, we conclude that counsel's performance was deficient under prevailing professional norms and was not the product of sound strategy. Our conclusion comports with that of the Nevada state post-conviction court—the only court to conduct an evidentiary hearing on this issue.

2.

[26] Because we have determined that counsel's performance was deficient, we must now decide whether "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. It is clear that, if Sechrest's counsel had performed competently, Dr. Gerow would not have been allowed to testify for the prosecution. Further, we have already found that Dr. Gerow's testimony, when considered in the context of the trial as a whole, likely played an important role in the jury's verdict imposing the death penalty. Accordingly, we conclude that Sechrest has satisfied the prejudice prong of *Strickland*. He is entitled to resentencing.[16]

CONCLUSION

With respect to the penalty phase, we hold that Sechrest's Sixth and Fourteenth Amendment right to a fair trial was violated by the prosecutor's gross misconduct. We also hold that Sechrest's Sixth Amendment right to effective assistance of counsel was violated when his trial attorney allowed Dr. Gerow to testify for the prosecution. Because we do not find either of these constitutional violations harmless, we reverse the district court as to Sechrest's sentence.

With respect to the guilt phase, we hold that Sechrest's *Miranda* rights were not violated, and affirm the district court on this ground. We also hold, however, that Sechrest's previously defaulted claims—which include both guilt and penalty phase claims—should not have been barred from federal

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[16] Because we conclude that Sechrest is constitutionally entitled to resentencing for two reasons, we do not address the contention that Dr. Gerow's testimony violates Sechrest's Fifth Amendment rights.

habeas review. We remand these claims to the district court for appropriate consideration.

Should the district court deny or dismiss Sechrest's guilt phase claims after appropriate and timely consideration, we instruct the district court to issue a writ of habeas corpus as to the death sentences unless, within a reasonable time, the State grants a new penalty phase trial or imposes a lesser sentence consistent with the law. We also instruct the district court to order Sechrest removed from death row during the pendency of the proceedings. Finally, we instruct the district court to order any other interim relief that it deems appropriate.

AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-N-92-0536-ECR(RAM)

[Filed April 19, 2004]

RICKY DAVID SECHREST, Petitioner,

v.

JOHN IGNACIO, *et al.*, Respondents.

ORDER

I. Introduction and Factual Background[1]

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Ricky David Sechrest, a Nevada prisoner under sentence of death. Sechrest's conviction and death sentence are the result of a

[1] The factual background set forth in this section of this Order is, in large part, adapted from the August 27, 1985 opinion of the Nevada Supreme Court. *See* Exhibit 71. That opinion was published as *Sechrest v. State*, 101 Nev. 360, 705 P.2d 626 (1985).

kidnapping and murder of two young girls near Reno, Nevada, on May 14, 1983.

In April 1983, Doris Schindler hired Zella Weaver to babysit her ten-year-old daughter, Maggie Schindler. In addition to caring for Maggie on weekday afternoons and evenings at the Schindler residence, Zella would pick Maggie up from the Meadowood Ice Arena on Saturdays when Maggie finished skating. *See* Testimony of Doris Schindler, Exhibit 43, pp. 21-34.[2]

On May 14, 1983, a neighbor of the Schindlers drove Maggie and Carly Villa, who was nine years old, to Meadowood, and dropped them off to skate. *See* Testimony of Andrea Comiso, Exhibit 43, pp. 35-37. Later that afternoon, Zella went to Meadowood to pick up Maggie and Carly, but could not find them. *See* Testimony of Doris Schindler, Exhibit 43, p. 26.

On June 7, 1983, two young men discovered the bodies of Maggie and Carly at Lagomarsino Canyon, a remote area east of Reno. *See* Testimony of Thomas John Sorenson, Exhibit 43, pp. 42-55. The bodies were about 50 yards apart, both covered with loose dirt. Carly's body was fully clothed; Maggie's body was clad only in a pair of panties. A pair of ice skates, as well as skate guards with the name "Maggie S." on them, were found near one of bodies. A dog leash was also found nearby. *See* Testimony of Don Means, Exhibit 44, pp.

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[2] The exhibits referred to in this Order, unless otherwise stated, are the exhibits filed by respondents, and found in the record at docket #32, #104, and #135. Regarding the form of the Court's citations to the exhibits found at docket #104, *see* footnote 3, *infra*.

1-21; Testimony of David Leland Keller, Exhibit 44, pp. 21-35; *see also* Testimony of Anton Paul Sohn, M.D., Exhibit 43, p. 77.

When Maggie and Carly disappeared, Zella's grandson, petitioner Ricky David Sechrest, lived with her. Maggie had been at the residence where Zella and Ricky David Sechrest lived. Sechrest knew that his grandmother routinely picked Maggie up at Meadowood on Saturdays. Testimony of Daniel Franklin Sportsman, Exhibit 44, pp. 35-42.

On June 13 and 14, 1983, Sechrest spoke to two Reno police officers. In the course of his June 14, 1983 statement, Sechrest admitted that on May 14, 1983, he picked up Maggie and Carly at Meadowood. He said that he asked Maggie if she wanted to go for a ride, and that she agreed. They drove to Lagomarsino Canyon. According to Sechrest, the three of them were walking in the hills at Lagomarsino Canyon, rock hunting, when Carly fell backward and hit her head. Sechrest said he thought Carly was dead, because he checked her pulse and found she did not have a pulse. Sechrest said Maggie began to "freak out on him," and was "between hysterical and crying." Sechrest stated that he knew it was wrong to be up in the hills with the girls. Sechrest said that Maggie began to run, and he panicked, caught her, and hit her on the back of the head with a rock. After hitting Maggie three or four more times with the rock after she fell, Sechrest went to his car and got a shovel. He returned to where Carly was lying, and thought she was still alive. Sechrest said he then struck her "once or twice" in the head with the edge of the shovel. Sechrest said that he then took off Maggie's clothing, and attempted to have sexual intercourse with her. When he was unable to do

that, he masturbated and ejaculated onto her body. Sechrest then covered the bodies with loose dirt, and left the scene. A recording of Sechrest's statement was played for the jury, and a transcript of it was provided to the jury. *See* Testimony of Robert Bogison, Exhibit 42, pp. 45-55.

A nine-year-old girl named Tanya Wagner testified at trial that she skated with Maggie and Carly at Meadowood on May 14, 1983. Tanya testified that after skating the three of them had lunch at a restaurant in the mall. After eating lunch, on their way back to the rink, the girls saw a man that Maggie said was her babysitter. The man said to Maggie that they had better be going. Tanya went back to the rink to skate, and after she resumed skating, she saw Maggie come into the rink to get her ice skates and skate guards, and then she saw Maggie leave the rink in a hurry. Tanya identified Sechrest as the man she saw at the skating rink, whom Maggie described as her babysitter. *See* Testimony of Tanya Wagner, Exhibit 43, pp. 56-66.

Anton Paul Sohn, M.D., testified at trial that he performed the autopsies on Maggie and Carly. Dr. Sohn testified that, in his opinion, it was highly unlikely that Carly could have fallen and killed herself in the location where her body was found. Dr. Sohn testified that, in his opinion, Maggie and Carly both died of blunt force trauma to the head. Dr. Sohn found that numerous blows were delivered to the right side of each girl's head. Dr. Sohn testified that each girl's skull had fractures that could have been caused by rocks, and also fractures that could have been caused by a shovel. Testimony of Anton Paul Sohn, M.D., Exhibit 43, pp. 73-100.

Detective Don Means, of the Washoe County Sheriff's Department, testified at trial that on June 14, 1983, he participated in a search, pursuant to a warrant, at Sechrest's residence. The searching officers found three shovels. Testimony of Don Means, Exhibit 44, pp. 11-13. Robert Thompson, a technician from the Washoe County Crime Laboratory, testified that one of the shovels had human blood on it. Testimony of Robert Thompson, Exhibit 42, pp. 14-37.

Thompson also testified that he found human hair on the dog leash that was found near the graves. He testified that one of the hairs that he found on the dog leash, a six-inch hair, was similar to a number of hairs that were found in Sechrest's car, but was dissimilar from the hair of Maggie and Carly, and also dissimilar to the hair of Sechrest's lover, Daniel Sportsman. Thompson also testified that he found on the dog leash a shorter dark hair that was similar to Carly's hair. Testimony of Robert Thompson, Exhibit 42, pp. 14-37.

Daniel Sportsman testified at trial that he lived with Sechrest and his grandmother, and that he and Sechrest were lovers. Sportsman testified at trial that on May 14, 1983, Sechrest drove him to his work place and dropped him off at about 1:00 p.m. He testified that Sechrest returned, and picked him up at around 4:00 or 4:30 p.m. Sportsman testified that later in the afternoon or evening on May 14, 1983, he learned that Zella had not been able to find Maggie when she went to pick her up at Meadowood. Sportsman testified that on the following day, May 15, 1983, he and Sechrest went to the Schindlers' home, and helped with the search for the missing girls. *See* Testimony of Daniel Franklin Sportsman, Exhibit 44, pp. 35-54.

Sportsman described himself as homosexual; he described Sechrest as bisexual. Sportsman testified that he and Sechrest had engaged in acts of bondage. He said that on two occasions Sechrest had tied him up and had then ejaculated. *See* Testimony of Daniel Franklin Sportsman, Exhibit 44, pp. 56-60.

Sportsman testified that Sechrest sometimes kept in his car the shovel that was found at his residence with human blood on it. Sportsman testified that after the disappearance of Maggie and Carly, he helped Sechrest clean Sechrest's car, and then Sechrest sold it. *See* Testimony of Daniel Franklin Sportsman, Exhibit 44, pp. 60-63; *see also* Testimony of Daniel Franklin Sportsman, Exhibit 42, p. 64.

Sportsman testified that on about June 13 or 14, 1983, Sechrest told him that Sechrest "might have had something to do with" the disappearance of Maggie and Carly. *See* Testimony of Daniel Franklin Sportsman, Exhibit 44, pp. 81-83.

Sportsman testified that, around the time of the girls' disappearance, Sechrest changed his hair style -- he cut off his shoulder-length hair, and shaved off some of his facial hair. *See* Testimony of Daniel Franklin Sportsman, Exhibit 44, pp. 51-53.

Sechrest's stepfather testified at trial that Sechrest had lived for a time in Lockwood, Nevada, and that Sechrest was very familiar with the hills in the area where the missing girls' bodies were found. *See* Testimony of Jacob R. Presser, Exhibit 44, pp. 105-107.

II. Procedural History

Sechrest's trial commenced in Nevada's Second Judicial District Court on Monday, September 12, 1983. *See* Exhibit 40. The trial lasted one week. *See* Exhibits 40-44. On September 19, 1983, the jury returned its guilt-phase verdicts, finding Sechrest guilty of two counts of first degree murder and two counts of first degree kidnapping. Exhibits 47-50.

The penalty phase of the trial was held on September 26 and 27, 1983. *See* Exhibit 45. With respect to each of the two murders, the jury found four aggravating circumstances: (1) the murders were committed while Sechrest was engaged in the commission of or an attempt to commit kidnapping in the first degree; (2) the murders were committed while Sechrest was engaged in the commission of or an attempt to commit sexual assault; (3) the murders were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and (4) the murders involved torture, depravity of mind, or the mutilation of the victim. Exhibits 52 and 53. The jury found no mitigating circumstances. *Id.* As to each of the two murders, the jury imposed the death penalty. *Id.* On October 28, 1983, the trial court sentenced Sechrest, in accordance with the jury's verdicts, to the penalty of death for each of the two murders, and to imprisonment for life, without the possibility of parole, for each of the two kidnappings. Exhibits 56-59.

Sechrest appealed to the Nevada Supreme Court. Exhibit 63. The Nevada Supreme Court affirmed on August 27, 1985. Exhibit 71; *Sechrest v. State*, 101 Nev. 360, 705 P.2d 626 (1985), *overruled in part, Harte*

v. State, 116 Nev. 1054, 13 P.2d 420 (2000). Sechrest's conviction became final on September 17, 1985. *See* Exhibit 72.

On November 13, 1985, Sechrest filed a petition for post conviction relief in the state district court. Exhibits 80 and 92. The state district court conducted an evidentiary hearing on November 8, 1990. Exhibit 95. On January 14, 1991, the state district court denied the post-conviction petition. Exhibit 103. Sechrest appealed that ruling to the Nevada Supreme Court, and the Nevada Supreme Court affirmed on February 20, 1992. Exhibit 113; *Sechrest v. State,* 108 Nev. 158, 826 P.2d 564 (1992).

Sechrest filed a *pro se* federal habeas corpus petition, initiating this action, on August 3, 1992 (docket #1). The Court appointed counsel to represent Sechrest (docket #5 and #16); Counsel filed a First Amended Petition (docket #47) on Sechrest's behalf on October 31, 1994.

On March 1, 1995, respondents filed a motion to dismiss, arguing that none of Sechrest's claims for habeas corpus relief were exhausted in state court (docket #62). On September 26, 1995, the Court granted the motion to dismiss, with leave to amend to more specifically state where and when he exhausted his state-court remedies (docket #69).

Sechrest filed a Second Amended Petition on October 27, 1995 (docket #70). Respondents again moved to dismiss (docket #74), arguing that Sechrest still had not shown exhaustion of his state-court remedies with respect to any of his claims. The Court entered an Order (docket #81), on July 29, 1996,

finding that Sechrest's Second Amended Petition was mixed, in that it presented both claims that were exhausted and claims that were not. The Court dismissed Sechrest's mixed Second Amended Petition, and judgment was entered (docket #81 and #82).

Sechrest appealed from the dismissal of his Second Amended Petition (docket #84). The Ninth Circuit Court of Appeals ruled initially on August 27, 1998 (docket #93), and subsequently amended its decision on September 16, 1998 (docket #94). The Court of Appeals noted that Sechrest had, after this Court's dismissal of his Second Amended Petition, returned to state court to exhaust his unexhausted claims. Sechrest filed a Petition for Writ of Habeas Corpus in state court on August 29, 1996. Exhibit 1(104).[3] On September 4, 1996, the state trial court dismissed the petition as procedurally barred. Exhibit 2(104)M. On November 20, 1997, the Nevada Supreme Court dismissed Sechrest's appeal from that ruling. Exhibit 3(104).

In the Ninth Circuit Court of Appeals' Order, as amended, the court ruled that five of the claims in Sechrest's Second Amended Petition were exhausted; the court ruled that the others were procedurally

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[3] On December 28, 1998, respondents filed three exhibits, designated Exhibits 1, 2, and 3, which include documents relative to Sechrest's second post conviction petition in state court (docket #104). To distinguish those exhibits from Exhibits 1, 2, and 3 filed by respondents on September 1, 1993 (docket #32), the Court refers to the exhibits filed by respondents on December 28, 1998, as "Exhibit 1(104)," "Exhibit 2(104)," and "Exhibit 3(104)." Exhibit 2(104) includes subparts A through R, which are referred to as "Exhibit 2(104)A," "Exhibit 2(104)B," etc.

barred (docket #93 and #94). The court dismissed the appeal and remanded, ordering this Court to vacate the order dismissing the petition, permit Sechrest to delete the claims that are procedurally barred, and proceed to address the merits of the five unexhausted claims. August 27, 1998 Order (docket #93 and #94), p. 3.

On May 20, 1999, Sechrest filed a Third Amended Petition for Writ of Habeas Corpus (docket #115). Respondents answered the Third Amended Petition (docket #120), and Sechrest filed a Traverse (docket #126). Respondents then filed a Notice of Supplemental Authority (docket #131).

On June 27, 2003, the Court entered an Order (docket #131) expanding the record. The Court ordered respondents to file and serve copies of certain exhibits admitted into evidence at Sechrest's trial. The June 7, 2003 Order granted Sechrest an opportunity to respond to the expansion of the record, and time for respondents to reply. Respondents filed the exhibits, as ordered, on July 21, 2003 (docket #135). Sechrest did not file a response.

The Third Amended Petition includes the five claims that the Court of Appeals determined to be exhausted in state court. None of those claims is procedurally defaulted. The Third Amended Petition is before the Court with respect to the merits of Sechrest's five claims for habeas corpus relief.

III. Habeas Corpus Standards

Sechrest's federal habeas corpus petition was filed prior to enactment of the Antiterrorism and Effective

Death Penalty Act of 1996 ("AEDPA"); therefore, pre-AEDPA standards apply to his claims. *Lindh v. Murphy*, 521 U.S. 320, 322-23, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003), *Mayfield v. Woodford*, 270 F.3d 915, 921 n.5 (9th Cir. 2001) (en banc).

On a pre-AEDPA petition for a writ of habeas corpus, this Court reviews the state-court conviction and sentence with regard to claims "that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (pre-AEDPA)[4] *see also Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to re-examine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

Because federal habeas review delays finality and burdens state-federal relations, federal habeas review must balance the protection offered by the writ of habeas corpus from unlawful custody against "the presumption of finality and legality" that attaches to a state-court conviction after direct review. *See Brecht v. Abrahamson*, 507 U.S. 619, 635-37, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *McClesky v. Zant*, 499 U.S. 467, 490-91, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1990). "It is the petitioner's burden to prove his custody is in

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[4] In this Order, unless otherwise specified, all references to 28 U.S.C. § 2254 refer to that statute as it existed prior to enactment of the AEDPA.

violation of the Constitution, laws or treaties of the United States." *Snook v. Wood*, 89 F.3d 605, 609 (9th Cir. 1996).

The federal court must presume that state-court findings of fact are correct, unless one of eight exceptions applies. *See* 28 U.S.C. § 2254(d) (pre-AEDPA); *see also Mayfield,* 270 F.3d at 922; *Thompson v. Borg,* 74 F.3d 1571, 1573 (9th Cir. 1996); *Swan v. Peterson,* 6 F.3d 1373, 1379 (9th Cir. 1993), *cert. denied*, 513 U.S. 985, 115 S.Ct 479, 130 L.Ed.2d 393 (1994). In contrast, legal questions, and mixed questions of law and fact, are reviewed *de novo. See Mayfield*, 270 F.3d at 922; *Thompson,* 74 F.3d at 1573; *Swan*, 6 F.3d at 1379.

IV. Analysis of the Merits of Sechrest's Claims

A. Ground 1 - Sechrest's Claim that He Was Denied a Fair Trial, in Violation of the Sixth and Fourteenth Amendments to the United States Constitution, as a Result of Jury Instructions and Comments of the Prosecutor Regarding Executive Clemency.

In Ground 1 of his Third Amended Petition, Sechrest asserts the following:

> Petitioner was denied a fair trial because of the Court's failure to *sua sponte* object to the State's inflammatory and improper comments regarding possible executive clemency if the jury were to hand down anything except the death penalty. The Court also failed to admonish the jury to disregard the State's arguments regarding possible executive

> clemency. Therefore, it cannot be determined with any certainty that the inflammatory comments did not unfairly influence the jury's decision to hand down the death penalty.
>
> A district judge has the duty under the Sixth Amendment to ensure that every accused receives a fair trial. The prosecutor in the instant case improperly commented and argued to the jury that if a sentence of life in prison without the possibility of parole was imposed, there was no guarantee that the jury's verdict would be properly executed, the prosecutor was allowed by the trial court to argue that the only way to keep the community safe was to kill the Petitioner.

Third Amended Petition (docket #115), p. 9, lines 9-19 (as in original). Sechrest argues that he was denied a fair trial in this manner in violation of the Sixth and Fourteenth Amendments. *Id.*; *see also* Traverse, p. 12, lines 11-14.

Sechrest specifically complains of the following comments of the prosecutor during jury selection:

> The judge is going to give you an instruction at the penalty phase, if we get there, that he will impose the penalty that you say, but if you say life in prison without parole, that doesn't mean that the pardons board can't let him out. Now, would you consider that when you arrive at your verdict?

* * *

> And His Honor will, I imagine, because many times I have been in front of His Honor, will give you a charge, a jury instruction saying if you impose life without parole that really doesn't mean life forever. If he gives you that charge, will you take that into consideration in deciding what the verdict ought to be?

Exhibit 41, p. 170, lines 14-19, and p. 226, lines 7-12; *see also* Third Amended Petition, p. 9. Sechrest also points to the following arguments of the prosecutor during the penalty phase of the trial:

> Now, the judge has told you that if you return a verdict, whatever verdict you return, he will impose. He also told you, and it is very important under the laws of this state, the State of Nevada, any sentence imposed by the jury may be refused by the State Board of Pardon commissioners. Whatever sentence you return in your verdict this Court will impose that sentence. Whether or not the State Board of Pardon commissioners, upon review, if requested by the defendant, would change that sentence, the Court has no way of knowing. Indeed, you don't either. The State Board of Pardon commissioners, however, would have the power to modify any sentence at a later date. And what that means is, let's say you fall -- I am going to talk about his defense. It was a fraud. And let's say you fall for that fraud and you say well, gee, I just can't bring myself to do what I should do, and I am going to impose life without parole. You don't die in prison of old age. People get out. Now are you prepared to risk the life of some other person or child by

giving him the opportunity to get out? That will be your risk. That will be your burden.

* * *

Never getting out. As the judge has instructed you, the pardons board has the ultimate authority to review any sentence, to pardon anybody. If you return a verdict of life without possibility of parole, I represent to you as a lawyer, as an attorney for the people of this county, that the pardons board has the authority to commute that tomorrow if they want to. They won't, of course, but they have the authority to. So don't buy that he is going to go to jail forever. It just doesn't happen.

Exhibit 45, p. 102, lines 10-28, and p. 129, lines 19-27; *see also* Third Amended Petition, p. 10.

The trial court instructed the jury as follows:

If the penalty is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served.

If the penalty is fixed at life imprisonment without the possibility of parole, the defendant shall not be eligible for parole.

Under the laws of the State of Nevada, any sentence imposed by the jury may be reviewed by the State Board of Pardon Commissioners. Whatever sentence you return in your verdict, this Court will impose that sentence. Whether

> or not the State Board of Pardon Commissioners upon review, if requested by the defendant, would change that sentence, this Court has no way of knowing. The State Board of Pardon Commissioners, however, would have the power to modify any sentence at a later date.

Exhibit 51, Instruction No. 15.

Sechrest bases his claim on the Sixth and Fourteenth Amendments. *See* Third Amended Petition, p. 9, lines 6-8; Traverse, p. 12, lines 11-14. It appears that the claim might have been better grounded on the Eighth Amendment, as applied to the States through the Fourthteenth Amendment. The Eighth and Fourteenth Amendments generally ensure that the death penalty is not imposed in an arbitrary or capricious manner. *See Lockett v. Ohio,* 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion of Burger, C.J.); *Gregg v. Georgia,* 428 U.S. 186-89, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Courts have generally addressed issues similar to the one raised by Sechrest with reference to the Eighth Amendment. *See, e.g., California v. Ramos,* 463 U.S. 992, 994, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983); *Gallego v. McDaniel,* 124 F.3d 1065, 1074-76 (9th Cir. 1997); *Hamilton v. Vasquez,* 17 F.3d 1149, 1160 (9th Cir.), *cert. denied,* 512 U.S. 1220, 114 S.Ct. 2706, 129 L.Ed.2d 834 (1994).

Courts do, however, refer to a general right to a fair trial guaranteed by the Sixth and Fourteenth Amendments. *See, e.g., Holbrook v. Flynn,* 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), *Morgan v. Aispuro,* 946 F.2d 1462, 1464 (9th Cir. 1991), *cert. denied,* 506 U.S. 830, 113 S.Ct. 92, 121

L.Ed.2d 54 (1992). And, Sechrest might argue that the Sixth Amendment, applicable to the states through the Fourteenth Amendment, guarantees a criminal defendant to a trial by an impartial jury, and anything done to mislead or unfairly influence the jury implicates that constitutional right. *Cf. Parker v. Gladden,* 385 U.S. 363, 364-66, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966). However, Sechrest has not cited any authority -- and the Court knows of none -- directly supporting the proposition that the jury instruction or prosecutorial argument regarding executive clemency violated Sechrest's rights under the Sixth and Fourteenth Amendments.

At any rate, whether Sechrest's claim is viewed as a Sixth Amendment claim or an Eighth Amendment claim, Sechrest is not entitled to habeas corpus relief.

In *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), a capital habeas corpus case, the Supreme Court considered the constitutionality of a jury instruction regarding the possibility of executive clemency.[5] The Court held that

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[5] *In Ramos,* the following jury instruction was given at the penalty phase of the trial:

> You are instructed that under the State Constitution a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime. Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

Ramos, 463 U.S. at 995-96. At the time, California law required that such an instruction be given. That requirement was

the Federal Constitution did not prohibit an instruction informing the jury of the Governor's power to commute a sentence without the possibility of parole to a sentence of life with the possibility of parole, and the Court also held that the failure of such an instruction to inform the jury of the Governor's power to commute a death sentence to a sentence of imprisonment did not violate the Constitution. The Court stated its holding as follows:

> In sum, the Briggs Instruction does not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process. It does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissibly inject an element too speculative for the jury's deliberation. Finally, its failure to inform the jury also of the Governor's power to commute a death sentence does not render it constitutionally infirm. Therefore, we defer to the State's identification of the Governor's power to commute a life sentence as a substantive factor to be presented for the sentencing jury's consideration.
>
> Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their States should not be permitted to consider the Governor's

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incorporated into the California Penal Code as a result of a 1978 voter initiative known as the "Briggs Initiative." Therefore, the Supreme Court in *Ramos* referred to the jury instruction as a "Briggs instruction." *See id.* at 995.

> power to commute a sentence. It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires. We sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the States. We hold only that the Eighth and Fourteenth Amendments do not prohibit such an instruction.

Ramos, 463 U.S. at 1013.

In light of *Ramos,* this Court determines that the jury instruction given to the jury at Sechrest's trial, regarding executive clemency, was constitutional.

Sechrest argues, as follows, that the jury instruction, and the argument of the prosecutor based upon it, were misleading:

> The comments and instruction oversimplified the process of clemency. *McClain v. Calderon,* 134 F.3d 1383, 1385 (1998). The jury was not informed that the State Board of Pardons Commissioners at the time consisted of the Governor, Justices of the Nevada Supreme Court, and the Attorney General. NRS 213.010 (version at the time). The jury was not informed that any person intending to apply to have the punishment commuted or a pardon granted must give notice not only to the Board, but to the District Attorney and the district court of the county where the conviction was handed down, as well as the warden of the Nevada State Prison. The District Attorney as well as

> the Warden of the Nevada State Prison may argue against any commutation or pardon and submit their own recommendations. Testimony may also be given as to the merits of either position. Moreover, any prison[er] who has once applied and been denied favorable action on his request may not apply a second time to the Board absent "substantial change in circumstances." The second application must be previously approved by the Secretary of the Pardons Board.
>
> Further, when a death penalty case is being considered, the presence of the governor is required and any judgments must be made by the majority of the Board. Rules of the Board, Rule 9. There are further rules regarding statements as to the character of the prisoner and the sentence to which the death penalty may be commuted. Rule 10. No application may be considered until the prison[er] has done at least ten years. Rule 15. The instruction and the comments failed to mention or explain any of these or any other requirements of the process. Thus, like the failure to mention the fact that a death penalty can also be commuted or pardoned, the failure to explain this process resulted in a fraud being perpetrated on the jury, and the Sixth Amendment rights of Mr. Sechrest being violated.

Third Amended Petition, pp. 12-13.

The Court of Appeals has held that an instruction regarding executive clemency unconstitutional if it is inaccurate. *See Coleman v. Calderon*, 210 F.3d 1047,

1050-51 (9th Cir. 2000)("*Coleman II*"); *Coleman v. Calderon*, 150 F.3d 1105, 1118 (9th Cir. 1998)("*Coleman I*"), *reversed on other grounds*, *Calderon v. Coleman*, 525 U.S. 141, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998); *McClain v. Calderon*, 134 F.3d 1383, 1386 (9th Cir.), *cert. denied*, 525 U.S. 942, 119 S.Ct. 364, 142 L.Ed.2d 301 (1998); *Gallego v. McDaniel*, 124 F.3d 1065, 1076 (9th Cir. 1997), *cert. denied*, 524 U.S. 922, 118 S.Ct. 2311, 141 L.Ed.2d 169 (1998), *and cert. denied*, 524 U.S. 917, 118 S.Ct. 2299, 141 L.Ed.2d 159 (1998); *Hamilton v. Vasquez*, 17 F.3d 1149, 1160-63 (9th Cir.), *cert. denied*, 512 U.S. 1220, 114 S.Ct. 2706, 129 L.Ed.2d 834 (1994). "This rule relies upon the Supreme Court's emphasis on the importance of accuracy in the description of sentencing alternatives in a death penalty proceeding." *Coleman I*, 150 F.3d at 1118 (citing *Ramos*, 463 U.S. at 1009).

In this case, regarding the kinds of sentences that could be commuted, the jury instruction stated: "Under the laws of the State of Nevada, *any* sentence imposed by the jury may be reviewed by the State Board of Pardon Commissioners." Exhibit 51, Instruction No. 15 (emphasis added). The plain language of the instruction referred to all sentences, including sentences of death as well as sentences of life in prison. The jury instruction was not misleading in that regard.

Regarding the procedural aspects of executive clemency in Nevada described in Sechrest's argument -- the membership of the State Board of Pardons Commissioners, the time that must be served before an application for clemency may be considered, the procedures applicable to first and second applications for clemency, and the procedures applicable to an

application for commutation of a death sentence -- there is no constitutional requirement that the jury instruction must explain such matters. In *Coleman II*, *Coleman I*, *McClain*, *Gallego*, and *Hamilton*, the jury instructions at issue were misleading, and unconstitutional, because they overstated the possibility of the defendant receiving commutation of a sentence from life without the possibility of parole to life with the possibility of parole. *See Coleman II*, 210 F.3d at 1050; *Coleman I*, 150 F.3d at 1119; *McClain*, 134 F.3d at 1386; *Gallego*, 124 F.3d at 1076; *Hamilton*, 17 F.3d at 1160-63; *see also Geary v. State*, 112 Nev. 1434, 1440-41, 930 P.2d 719, 723-24 (1996). That is not the case here. The jury instruction in this case did not overstate the possibility of executive clemency.

Sechrest also relies in his argument upon Nevada caselaw that prescribes an instruction on executive clemency different from the one given in his case. *See* Third Amended Petition, pp. 11-12 (citing *Geary, supra; Sonner v. State*, 112 Nev. 1328, 930 P.2d 707 (1996), *cert. denied*, 525 U.S. 886, 119 S.Ct. 199, 142 L.Ed.2d 163 (1998); and *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985)).

In *Petrocelli*, the Nevada Supreme Court considered a jury instruction like the one at issue in this case, and held that "the instruction given here did not constitute error." *Petrocelli*, 101 Nev. at 56, 692 P.2d at 510. The Nevada Supreme Court went on, however, to set out a jury instruction regarding executive clemency, and require that it be given at subsequent trials. *Id.*, 101 Nev. at 56, 692 P.2d at 510-11. Later, in *Geary* and *Sonner*, the Nevada Supreme Court reiterated and refined its requirements regarding the jury

instruction. *Geary*, 112 Nev. at 1440, 930 P.2d 723-24; *Sonner*, 112 Nev. at 1333-34, 930 P.2d at 711-12.

It is important to note that the requirements set forth by the Nevada Supreme Court in *Petrocelli*, *Geary*, and *Sonner*, were not rooted in federal constitutional law; the requirements set forth in *Petrocelli*, *Geary*, and *Sonner* were imposed as a matter of state law. In *Ramos*, the Supreme Court stated:

> Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their States should not be permitted to consider the Governor's power to commute a sentence. It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires. We sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the States. We hold only that the Eighth and Fourteenth Amendments do not prohibit such an instruction.

Ramos, 463 U.S. at 1013-14. As contemplated in *Ramos*, the Nevada Supreme Court, in *Petrocelli*, *Geary*, and *Sonner*, placed state-law restrictions on jury instructions regarding executive clemency. Those state-law restrictions do not have any bearing on the federal constitutional issues raised by Sechrest in this federal habeas action.

Sechrest also relies upon *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

See Traverse, pp. 12-13. In *Caldwell,* a capital murder case, the prosecuting attorney argued as follows: "Now, they [defense counsel] would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it." *Caldwell,* 472 U.S. at 325. The Supreme Court vacated the death penalty in *Caldwell,* holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell,* 472 U.S. at 328-29. The Supreme Court subsequently explained that *Caldwell* applies to comments that "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright,* 477 U.S. 168, 184 n.15, 106 S.Ct 2464, 91 L.Ed.2d 144 (1986). "To establish *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Romano v. Oklahoma,* 512 U.S. 1, 8-9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994) (quoting *Dugger v. Adams,* 489 U.S. 401, 407, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989)). Nothing in *Caldwell* prohibits a trial court from giving accurate jury instructions regarding the possibility of executive clemency. In fact, in *Caldwell,* the Supreme Court discussed *Ramos,* and distinguished the jury instruction in *Ramos* from the prosecutor's arguments in *Caldwell. Caldwell* did not disturb the holding of *Ramos.*

The Court concludes that the executive-clemency jury instruction given by the court at the penalty

phase of Sechrest's trial was constitutional. That jury instruction was accurate, did not overstate the chances of Sechrest receiving commutation of a sentence of life without the possibility of parole to a sentence of life with the possibility of parole, and did not improperly describe the role of the jury.

The issue remaining is the effect of the arguments of the prosecutor. The need for accurate instructions is heightened when the prosecution argues the issue of a defendant's future dangerousness. *See Simmons v. South Carolina*, 512 U.S. 154, 163-66, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (due process violated when trial court refused to give accurate parole-eligibility instruction to rebut the prosecutor's argument about future dangerousness); *see also Coleman II*, 210 F.3d at 1051 ("The prosecutor's closing argument exacerbated the impact of the misleading instruction by emphasizing the threat Coleman posed to the general public."); *Hamilton,* 17 F.3d at 1162 ("The probability of the jury's improper speculation was compounded by the prosecutor's inappropriate assertion in closing argument that Hamilton, if sentenced to prison, would be 'conniving and devising ways to manipulate the system and get out.'").

The Court finds that for the most part the arguments of the prosecution complained of by Sechrest were accurate, and did not render unfair the penalty phase of Sechrest's trial.

However, the Court finds misleading the prosecutor's comment that "[y]ou don't die in prison of old age." *See* Exhibit 45, p. 102, line 25. The prosecutor's suggestion to the jury was that if Sechrest was sentenced to life without possibility of parole, it

was certain that he would obtain a commutation of his sentence to life with the possibility of parole, and would be granted parole and released from prison. This was a misleading overstatement.

The prosecutor also argued to the jury as follows:

> If you return a verdict of life without possibility of parole, I represent to you as a lawyer, as an attorney for the people of this county, that the pardons board has the authority to commute that tomorrow if they want to. They won't of course, but they have the authority to. So don't buy that he is going to jail forever. It just doesn't happen.

Exhibit 45, p. 129, lines 21-27. Here, too, the prosecutor exaggerated the prospects for commutation and parole. When the prosecutor told the jury not to believe that Sechrest would be imprisoned the rest of his life -- "[i]t just doesn't happen" -- he overstated the chances of Sechrest receiving a commutation and parole.

Moreover, the Pardons Board did not have the authority to commute a sentence immediately, or "tomorrow" as the prosecutor phrased it. At the time that Sechrest was sentenced, there was in effect a rule of the Board of Pardons Commissioners stating:

> The board will not consider an application for the commutation of a sentence of life without the possibility of parole to life with the possibility of parole until 7 calendar years have been served by the applicant.

Board of Pardons Commissioners Rule No. 15, Nevada Administrative Code § 213.110. The prosecutor's statement that the Board of Pardons Commissioners could "tomorrow" commute a sentence of life without the possibility of parole to a sentence of life with the possibility of parole was a misstatement.

The trial court's jury instructions did not correct the misstatements made to the jury by the prosecutor. This Court finds that there was error in this regard. The remaining question is whether the error was harmless.

The Supreme Court held in *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), that a federal court may grant habeas corpus relief based on trial error only when that error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 507 U.S. at 637 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). "This standard reflects the 'presumption of finality and legality' that attaches to a conviction at the conclusion of direct review." *Calderon v. Coleman,* 525 U.S. 141, 145-46, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998) (quoting *Brecht,* 507 U.S. at 633). The *Brecht* standard "protects the State's sovereign interest in punishing offenders and its 'good-faith attempts to honor constitutional rights.'" *Calderon,* 525 U.S. at 146 (quoting *Brecht,* 507 U.S. at 635). Moreover, the *Brecht* standard upholds the prominence of the trial, while ensuring that the extraordinary habeas corpus remedy is available to those "whom society has grievously wronged." *See Calderon,* 525 U.S. at 146; *Brecht,* 507 U.S. 634-35.

The Court concludes that, taking into consideration all the circumstances of this case, and all the evidence before the jury, the improper arguments of the prosecutor regarding executive clemency did not have a substantial and injurious effect or influence in determining the jury's verdict.

The error was caused by arguments made by the prosecutor. This distinguishes this case from *Coleman II*, 210 F.3d 1047 (9th Cir. 2000). In *Coleman II,* it was the trial court's jury instructions that were misleading; rendering it nearly certain that the jury misunderstood the chances of clemency. Here, on the other hand, the jury instruction regarding executive clemency, standing on its own, was accurate and constitutional. The misleading statements were in comments made by the prosecutor in the heat of argument. In contrast to *Coleman II,* the inaccurate information was not presented to the jury with the court's imprimatur.

Furthermore, in his argument, the prosecutor stated:

> If you return a verdict of life without possibility of parole, I represent to you as a lawyer, as an attorney for the people of this county, that the pardons board has the authority to commute that tomorrow if they want to. *They won't of course,* but they have the authority to. So don't buy that he is going to jail forever. It just doesn't happen.

Exhibit 45, p. 129, lines 21-27 (emphasis added). The prosecutor conveyed to the jury in his argument, by stating "they won't of course," that Sechrest would not

immediately receive a commutation and parole. This, to some extent, tempered the effect of the prosecutor's misstatement.

In addition, Sechrest's counsel argued as follows:

> Mr. Lane [the prosecutor] has made great moment of the fact that there is a pardons board, that he might some day get out of prison. But in Nevada, it is virtually impossible. I don't think realistically Mr. Sechrest will ever be out of jail again. He will be in prison the rest of his life.

Exhibit 45, p. 116, line 30 - p. 117, line 4. This provided some counterweight to the prosecutor's improper arguments.

The four aggravating circumstances asserted by the prosecution were the following:

> (1) that the murders were committed while Sechrest was engaged in the commission of or an attempt to commit kidnapping in the first degree;
>
> (2) that the murders were committed while Sechrest was engaged in the commission of or an attempt to commit sexual assault;
>
> (3) that the murders were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and
>
> (4) that the murders involved torture, depravity of mind, or the mutilation of the victim.

See Exhibit 51, Instruction No. 5. The improper argument of the prosecutor did not relate directly to any of the asserted aggravating circumstances that the jury was to consider.

Nor did the prosecutor's improper argument undercut, or preclude the jury's consideration of, any mitigating factor asserted by the defense. Regarding possible mitigating factors, the Court instructed the jury as follows:

> NRS 200.035 provides that the defendant may offer the following circumstances to mitigate murder of the first degree:
>
> 1. The defendant has no significant history of prior criminal activity.
>
> 2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> 3. The victim was a participant in the defendant's criminal conduct or consented to the act.
>
> 4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
>
> 5. The defendant acted under duress or under the domination of another person.
>
> 6. The youth of the defendant at the time of the crime.

7. Any other mitigating circumstance.

Exhibit 51, Instruction No. 13. In his argument, Sechrest's counsel specifically pointed out mitigating circumstances that Sechrest relied upon: he argued that Sechrest had no significant history of criminal activity; he argued that the murders were committed while Sechrest was under the influence of extreme mental and emotional distress; he argued that Sechrest's youth was a mitigating factor; and he argued certain witnesses who testified on Sechrest's behalf at the penalty phase provided some mitigation. *See* Exhibit 45, pp. 123-26. The prosecutor's misstatements regarding executive clemency did not undercut any of the mitigating circumstances relied upon by Sechrest.

Therefore, while the prosecutor's arguments regarding executive clemency went to a point that must be considered to have been of concern to the jury -- the question whether Sechrest would ever be released from prison if he was sentenced to life without the possibility of parole -- those arguments did not go to the heart of the jury's decision, the balance of aggravating and mitigating circumstances.

The Court finds that the most important considerations informing the jury's sentencing decision must have been the aggravating circumstances related to the nature of the crimes. The jury found that the murders were committed in the course of kidnappings and sexual assaults, and that they were committed to avoid lawful arrest or effect an escape from custody. The jury also found that the murders involved torture, depravity of mind, or mutilation of the victims. Sechrest took two innocent and trusting young girls --

one nine years old and one ten years -- to a remote location and brutally murdered them using rocks and a shovel. Sechrest then undressed one of the dead girls, attempted to have intercourse with her lifeless body, and then, when he could not, masturbated and ejaculated onto her body. The aggravating factors related to the specific circumstances of these heinous murders were surely the predominant factor behind the jury's imposition of the death penalty. In view of the entire record in this case, the Court finds that the misstatements of the prosecutor regarding the possibility of executive clemency did not have a substantial and injurious effect or influence in determining the jury's verdict.[6]

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[6] In making this determination, the Court assumes, for purposes of analysis, that Sechrest's counsel provided him with ineffective assistance in allowing Dr. Gerow to testify at the penalty phase of the trial, as claimed by Sechrest in Ground 5. The Court determines, *infra*, that there was no such ineffective assistance of counsel; nonetheless, for purposes of this harmless error analysis, the Court assumes that there was such error. The Court recognizes the interplay between the error that the Court finds in the context of Ground 1 and the error claimed by Sechrest in Ground 5. *See Ceja v. Stewart*, 97 F.3d 1246, 1254 (9th Cir.1996) ("Multiple errors, even if harmless individually, may entitle a petitioner to habeas relief if their cumulative effect prejudiced the defendant.") (citing *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992), *cert. denied*, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993)). Dr. Gerow's testimony was to the effect that Sechrest was dangerous and would not change. Arguably, that is something the jury may have considered in conjunction with the prosecutor's overstatements of the chances of Sechrest receiving a commutation and parole if sentenced to life without the possibility of parole. However, even considering the error in Ground 1 together with the claimed error in Ground 5, the Court concludes that such aggregate error did not have a substantial and injurious effect or influence in determining the jury's verdict.

In his Prayer for Relief, Sechrest requests an evidentiary hearing. *See* Third Amended Petition, p. 39, lines 9-10; Traverse, p. 44, lines 15-16. A petitioner is entitled to an evidentiary hearing on a habeas claim if (1) the allegations, if proven, establish the right to relief, and (2) he did not receive a full and fair evidentiary hearing in the state court. *Beardslee v. Woodford,* 358 F.3d 560, 585 (9th Cir.2003) (citing *Williams v. Calderon,* 52 F.3d 1465, 1484 (9th Cir.1995)). However, an evidentiary hearing is not required if the claim presents a purely legal question and there are no disputed facts. *Id.* In this case, Sechrest did not file a separate motion for an evidentiary hearing fully explaining and supporting his request. Sechrest has not shown any need for an evidentiary hearing regarding Ground 1, because he has not described any contested question of fact upon which he could offer evidence to substantiate his claims. Moreover, the Court finds that Sechrest is not entitled to relief on Ground 1 even if he proves the facts that he alleges. *See Morales v. Woodford*, 336 F.3d 1136, 1152 (9th Cir. 2003) (evidentiary hearing unnecessary where the facts alleged, even if proven, would not entitle the petitioner to relief). The Court shall deny Sechrest's *pro forma* for an evidentiary hearing.

The Court shall deny petitioner habeas corpus relief with respect to Ground 1

B. Ground 2 - Sechrest's Claim that He Was Denied His Sixth Amendment Right to Effective Assistance of Counsel Due to the Failure of the Trial Court to Appoint a Second Attorney to Represent Him.

In Ground 2, Sechrest asserts that "[t]he trial court's denial of defense counsel's request to appoint a second attorney to assist in Petitioner's defense was an abuse of discretion and denied Petition effective assistance of counsel and a fair trial under the Sixth Amendment to the United States Constitution." Third Amended Petition, p. 13, line 26 - p. 14, line 1.

Sechrest does not point to any legal authority supporting his contention that the Sixth Amendment requires state trial courts to appoint two attorneys for defendants facing the death penalty, and this Court is aware of no such authority.

Sechrest's claim in Ground 2 fails because there is no legal authority supporting it. An evidentiary hearing is not warranted. *See Beardslee v. Woodford,* 358 F.3d 560, 585 (9th Cir. 2003); *see also Morales v. Woodford,* 336 F.3d 1136, 1151-53 (9th Cir. 2003) (evidentiary hearing unnecessary where the facts alleged, even if proven, would not entitle the petitioner relief).

The Court shall deny petitioner habeas corpus relief with respect to Ground 2

C. Ground 3 - Sechrest's Claim that His Fifth Amendment Right Against Self-Incrimination Was Violated By the Admission into Evidence of His Statements to the Police.

In Ground 3, Sechrest asserts that his rights under the Fifth and Fourteenth Amendments were violated by the admission into evidence of statements that he made to police officers. *See* Third Amended Petition, pp. 16-19. Sechrest contends that his statements were

not voluntary, that his statements were taken in violation of the rules of *Miranda v. Arizona,* 384 U.S. 436, 88 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and that any waiver of his rights was not knowingly and intelligently made. *Id.*

Involuntary confessions are inadmissible in state criminal prosecutions. *See Blackburn v. Alabama,* 361 U.S. 199, 207, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). An inculpatory statement is voluntary only if it is the product of a rational intellect and a free will. *Blackburn,* 361 U.S. at 208. "The test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Leon Guerrero,* 847 F.2d 1363, 1366 (9th Cir. 1988) (citing *Haynes v. Washington,* 373 U.S. 503, 513-14, 83 S.Ct. 1336, 10 L.Ed.2d 513(1963)); *see also Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 ("coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'"). If the suspect's decision to confess is "a product of the suspect's own balancing of competing considerations, the confession is voluntary." *United States v. Miller,* 984 F.2d 1028, 1031 (9th Cir. 1993) (quoting *Miller v. Fenton,* 796 F.2d 598, 605 (3d Cir.), *cert. denied,* 479 U.S. 989, 107 S.Ct. 585, 93 L.Ed.2d 587 (1986)). In making this determination, the court is to examine "all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte,* 412 U.S. 218, 220, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1971); *see also Henry v. Kernan,* 197 F.3d 1021, 1026-29 (9th Cir. 1999), *cert. denied,* 528 U.S. 1198, 120 S.Ct. 1262, 146 L.Ed.2d 117 (2000).

Miranda requires that a person subjected to custodial interrogation be advised that he has the right to remain silent, that statements made can be used against him, that he has the right to counsel, and that he has the right to have counsel appointed; these warnings must precede any custodial interrogation. *See Miranda v. Arizona,* 384 U.S. 436, 444, 88 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Following the *Miranda* warnings, if the suspect unambiguously requests counsel at any time during the interview, he is not subject to further questioning until a lawyer is made available, or until the suspect reinitiates conversation. *Davis v. United States,* 512 U.S. 452, 458, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); *Edwards v. Arizona,* 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Once properly advised of his rights as required by *Miranda,* an accused may waive those rights, so long as the waiver is voluntary, knowing, and intelligent. *Miranda,* 384 U.S. at 478-79. To be knowing and intelligent, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). A valid waiver depends upon the totality of the circumstances, including the background, experience, and conduct of the defendant. *North Carolina v. Butler,* 441 U.S. 369, 374-75, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

A statement taken in violation of *Miranda* cannot be used as proof of guilt. *See Harris v. New York,* 401 U.S. 222, 224, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

Sechrest sought before trial to suppress the statements that he made to the police. He filed a "Motion to Suppress Evidence" in the state trial court on August 25, 1983. Exhibit 15. The State responded on September 1, 1983. Exhibit 17. The trial court held an evidentiary hearing on the motion on September 2, 1983. *See* Exhibit 18 (transcript). At the conclusion of the hearing, the state trial court ruled that Sechrest's federal constitutional rights were not violated in connection with his statements to the police. *See* Exhibit 18, pp. 63-67.

Statements made by Sechrest to the police on June 14, 1983, were admitted into evidence at trial. In those statements, Sechrest admitted that on May 14, 1983, he picked up Maggie and Carly at Meadowood. He said that he asked Maggie if she wanted to go for a ride, and that she agreed. According to Sechrest, the three of them drove to Lagomarsino Canyon and were walking around in the hills at Lagomarsino Canyon, rock hunting, when Carly fell backward and hit her head. Sechrest said he thought Carly was dead, because when he checked her pulse she did not have one. Sechrest said Maggie began to "freak out on him," and was "between hysterical and crying." Sechrest stated that he knew it was wrong to be up in the hills with the girls. Sechrest said that Maggie began to run, and he panicked, caught her, and hit her on the back of the head with a rock. After hitting Maggie three or four more times with the rock after she had fallen, Sechrest went to his car and got a shovel. He returned to where Carly was lying, and thought she was still alive. Sechrest said he then struck her "once or twice" in the head with the edge of the shovel. Sechrest said that he then took off Maggie's clothing, and attempted to have sexual intercourse with her. When he was

unable to do that, he masturbated, and ejaculated onto her body. Sechrest then covered the bodies with loose dirt, and left the scene. Recordings of Sechrest's June 14, 1983 statements were played to the jury, and transcripts of the statements were provided to the jury. *See* Testimony of Robert Bogison, Exhibit 42, pp. 45-55.

On appeal, Sechrest contended that his Fifth Amendment rights were violated in connection with his statements to the police. *See* Appellant's Opening Brief, Exhibit 67, pp. 15-22. The Nevada Supreme Court summarized, as follows, the facts relative to this issue:

> Pursuant to the investigation of a grand larceny, Sechrest was approached on June 14, 1983 by officers from the Sparks Police Department. Advising Sechrest of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), Detective Wright asked him if he wanted to talk about the grand larceny charge. Sechrest replied that he wanted an attorney. Officers asked no further questions but took Sechrest to the Sparks Police Department for booking. While waiting to be booked, Sechrest turned to Detective Wright and Sergeant Gonyo and said: "I like you two guys, I don't want an attorney, I will talk to you." The officers proceeded with the booking and afterward Sechrest was given a standard rights waiver form, which he read and signed in the presence of the officers. During questioning Sechrest stated that the Reno Police were investigating him as a possible suspect in a homicide. Sparks Police did not question

Sechrest regarding the homicide but, rather, told him that they were only interested in the grand larceny charge.

After the interview was finished, Sergeant Gonyo left the room and then returned to inform Sechrest that Officer Bogison of the Reno Police Department was outside. Sergeant Gonyo asked Sechrest if he would like to talk to Officer Bogison, and Sechrest replied: "Yes, I like Mr. Bogison, he is the only one on my side, and understands me." [*Footnote:* Earlier that evening Detective Eubanks of the Reno Police Department had been contacted by Sechrest's friend, Danny Sportsman. Sportsman told Eubanks that Sechrest wanted to talk to Bogison. Bogison then contacted Mrs. Weaver, Sechrest's grandmother, at her home in an effort to [contact] Sechrest. Eubanks and Bogison then went to the Sparks Police Department where Sechrest was being questioned in regard to the unrelated grand larceny charge.] Officer Bogison then approached Sechrest and said: "I understand you want to talk to me, is that right?" Sechrest replied: "Yes." Sechrest said that he had spoken with his attorney and had been advised to keep his mouth shut. In response, Bogison said: "Well, there is nothing we can do to alter that, ... do you want to talk to me?" Sechrest replied: "I will tell you what, I will make a deal -- no, I won't make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won't." Bogison then said: "Does this mean you want to talk to us?" Sechrest replied: "Yes."

After the foregoing conversation Officer Bogison, Detective Eubanks and Sechrest entered an interrogation room. Sechrest requested that he be permitted to call his grandmother and also his attorney. After Sechrest spoke with his grandmother, Officer Bogison asked him: "Do you want to talk to your attorney?" Sechrest replied: No, I want to get this off my chest." He then made the statement in which he confessed to the murders.

[*Footnote:* The statement of June 14 had been preceded by other conversations between Sechrest and the Reno Police Department. Officer Bogison had spoken with him regarding the homicides as early as June 8. Officer Bogison and Detective Eubanks had also spoken to him the day before, June 13. In Sechrest's statement of June 13, he did not incriminate himself but, rather, maintained an alibi. The June 13 statement was made in response to a request for "background information," and Sechrest was not under arrest or in custody at the time. Near the end of this interview Sechrest stated that he wished to consult an attorney. Officers ceased questioning at this point and told Sechrest to feel free to "reinstitute contact" with them.]

Opinion, Exhibit 71, pp. 3-5

28 U.S.C. § 2254(d)(pre-AEDPA) provides:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: "And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d)(pre-AEDPA). The facts regarding Sechrest's statement to the police, as found by the state court, are entitled to a presumption of correctness under 28 U.S.C. § 2254(d) (pre-AEDPA). *See Thompson v. Keohane,* 516 U.S. 99, 106-16, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995); *see also Sumner v. Mata,* 449 U.S. 539, 545-47, 101 S.Ct. 764, 66 L.Ed.2d

722 (1981) (presumption of correctness pursuant to 28 U.S.C. § 2254 (pre-AEDPA) applicable to findings of fact made by state appellate court).

On the other hand, the state courts' determination regarding whether Sechrest was in custody on June 13, 1983, and the state courts' determination whether Sechrest acted voluntarily, knowingly, and intelligently, in waiving his rights and making a statement to the police, are not subject to such deference under section 2254(d), but, rather, are subject to independent review by this federal habeas court. *See Thompson,* 516 U.S. at 106-16 (determination whether petitioner was in custody for purposes of *Miranda* analysis not subject to deference under 28 U.S.C. § 2254 (pre-AEDPA)); *Miller v. Fenton,* 474 U.S. 104, 109-17, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (determination whether confession was voluntary not subject to deference under 28 U.S.C. § 2254 (pre-AEDPA)).

With respect to the historical facts set forth above, regarding Sechrest's statements to the police, Sechrest has not presented any claim that any of those facts is inaccurate, or that any of the eight exceptions in section 2254(d) applies. Therefore, applying the presumption of correctness mandated by section 2254, the Court accepts as true the facts surrounding Sechrest's statements to the police, as those facts were found by the Nevada Supreme Court.

Turning to the application of the law to the facts, the Court first determines that Sechrest's Fifth Amendment rights were not violated as a result of his June 13, 1983 statement.

The Supreme Court has described, as follows, the analysis that a federal habeas court is to undertake to determine whether a petitioner was "in custody" when a statement was made:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) *(per curiam)* (quoting [*Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977) *per curium*)]). The first inquiry, all agree, is distinctly factual. State-court findings on these scene- and action-setting questions attract a presumption of correctness under 28 U.S.C. § 2254(d). The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination, we hold, presents a "mixed question of law and fact" qualifying for independent review.

Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (footnote omitted). Applying these standards, the Court concludes that Sechrest was not in custody, such as would trigger the

application of *Miranda,* when he spoke with police officers on June 13, 1983. On that day, Sechrest voluntarily drove himself to the police station for the interview; he was told that the interview was strictly voluntary and that he could terminate it and leave whenever he wished; in fact, when Sechrest became tired, the interview ceased. *See* Exhibit 18, pp. 12-17, 23-33, 35-38 and 41-44 (testimony of Robert Bogison and Gary Stevens Eubanks at hearing regarding Motion to Suppress Evidence); *see also* Opinion, Exhibit 71, p. 5 n.3. When Sechrest spoke to the police on June 13, 1983, he was not under formal arrest, and there was no restraint on his freedom of movement of the degree associated with a formal arrest. A reasonable person under the circumstances would have felt that he or she was at liberty to terminate the interview and leave and that is what Sechrest eventually did. Because Sechrest was not in custody on June 13, 1983, there was not a *Miranda* violation in connection with his statement on that date.

Furthermore, any possible *Miranda* violation on June 13, 1983 would have been harmless. Sechrest did not incriminate himself on June 13, 1983. *See* Opinion, Exhibit 71, p. 5 n. 3. Sechrest's June 13, 1983 statement was not used against him at trial. *See* Exhibit 42, pp. 45-55 (trial testimony of Robert Bogison). Sechrest does not appear to allege that his defense was prejudiced by his June 13, 1983 statement. Any *Miranda* claim based on Sechrest's June 13, 1983 statement would, therefore, fail for this alternate reason. *See Ghent v. Woodford,* 279 F.3d 1121, 1134 (9th Cir. 2002) (subjecting *Miranda* error to harmless error analysis); *Henry v. Kernan,* 197 F.3d 1021, 1029-30 (9th Cir. 1999), *cert. denied,* 528 U.S. 1198, 120 S.Ct. 1262, 146 L.Ed.2d 117 (2000) (same);

see also Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 35 (error harmless if it did not have "substantial and injurious effect or influence in determining jury's verdict.").

Sechrest's June 14, 1983 statements, on the other hand, were used against him at trial. *See* Exhibit 42, pp. 45-55 (trial testimony of Robert Bogison).

Sechrest was arrested by Sparks police officers on June 14, 1983, on a grand larceny charge unrelated to the kidnappings and murders of Maggie and Carly. Sechrest was under arrest at the time of his June 14, 1983 statements, so *Miranda* applies to those statements. *See Mathis v. United States,* 391 U.S. 1, 4-5, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968) *(Miranda* applies even if the suspect's confinement is unrelated to the case under investigation).

Immediately after his arrest on June 14, 1983, Sechrest was advised of his rights as required by *Miranda. See* Exhibit 18, p. 5 (testimony of Les Wright at hearing regarding Motion to Suppress Evidence); *see also* Opinion, Exhibit 71, p. 3. Sechrest then invoked his right to counsel, and questioning properly ceased. *See* Exhibit 18, p. 5; *see also* Exhibit 71, p. 3.; *see also Davis v. United States,* 512 U.S. 452, 458, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); *Edwards v. Arizona,* 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

After Sechrest was transported to the Sparks Police Department, while in the booking area, Sechrest said to the Sparks police officers: "I like you two guys, I don't want an attorney, I will talk to you." *See* Exhibit 18, p. 6; *see also* Exhibit 71, p. 3. The officers

proceeded with the booking, and afterward Sechrest was given a standard rights waiver form, which he read and signed in the presence of the officers. *See* Exhibit 18, p. 6; *see also* Exhibit 71, pp. 3-4; *see also* Exhibit 141 (signed rights waiver form).

Every indication is that Sechrest's waiver of his rights under *Miranda,* and his decision to speak to the police, were voluntary. Taking into consideration the totality of the circumstances, the Court sees no sign of any physical or psychological coercion, or improper inducement, that might have overcome Sechrest's will. *See United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988); *see also Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). In this regard, Sechrest's claim that his statement was involuntary is conclusory; Sechrest does not allege any specific facts supporting his claim. The Court determines that Sechrest made his own voluntary decision to speak to the police.

Furthermore, the Court determines that Sechrest acted knowingly and intelligently when he waived his rights under *Miranda,* and decided to speak to the police. Every indication in the record -- particularly, the waiver of rights form that Sechrest signed -- points to the conclusion that Sechrest was fully aware of the nature of the rights he abandoned and the consequences of his decision to abandon those rights. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). Sechrest does not allege any facts regarding the circumstances, or regarding his background, experience, or conduct, suggesting otherwise. *See North Carolina v. Butler,* 441 U.S. 369, 374-75, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

Following Sechrest's voluntary, knowing, and intelligent waiver of his rights *Miranda,* the Sparks police officers proceeded to question him regarding the grand larceny charges. *See* Exhibit 18, p. 7; *see also* Exhibit 71, p. 4. During that questioning, Sechrest stated that the Reno police were investigating him as a possible suspect in a homicide. *See* Exhibit 18, pp. 7-8; *see also* Exhibit 71, p. 4. The Sparks police did not question Sechrest regarding the homicide but, rather, told him that they were only interested in the grand larceny charge. *See* Exhibit 18, p. 8; *also* Exhibit 71, p. 4.

When the questioning regarding the grand larceny charge was completed, one of the Sparks police officers informed Sechrest that Reno Police Officer Robert Bogison was outside the room, and asked if Sechrest would like to talk to him. Sechrest responded: "Yes, I like Mr. Bogison, he is the only one on my side, and understands me." Officer Bogison then approached Sechrest and said: "I understand you want to talk to me, is that right?" Sechrest replied: "Yes." Sechrest said that he had spoken with his attorney and had been advised to keep his mouth shut. In response, Bogison said: "Well, there is nothing we can do to alter that, ... do you want to talk to me?" Sechrest replied: "I will tell you what, I will make a deal -- no, I won't make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won't." Bogison then asked: "Does this mean you want to talk to us?" Sechrest replied: "Yes." At that point, Bogison, Reno Police Officer Gary Steven Eubanks, and Sechrest entered an interrogation room. Sechrest then requested that he be permitted to call his grandmother and his attorney, and he was allowed to do that. After Sechrest spoke with his grandmother, Bogison asked

him: "Do you want to talk to your attorney?" Sechrest replied: No, I want to get this off my chest." Sechrest then made statements in which he confessed to the murders. *See* Exhibit 18, pp. 8, and 21-23; 33-34, 39-42, *see also* Exhibit 71, pp. 4-5.

Bogison and Eubanks were not required to provide *Miranda* warnings to Sechrest; Sechrest had already received those warnings from the Sparks police. *See United States v. Nordling,* 804 F.2d 1466, 1471 (9th Cir.1986) (new *Miranda* warnings not required before questioning by different officers regarding different crimes, where no appreciable time elapsed between interrogations); *see also United States v. Baron,* 94 F.3d 1312, 1320 (9th Cir. 1996), *cert. denied*, 519 U.S. 1047, 117 S.Ct. 624, 136 L.Ed.2d 546 (1996) (new *Miranda* warnings not required between interviews by officers representing separate sovereigns); *United States v. Andaverde,* 64 F.3d 1305, 1313 (9th Cir. 1995), *cert. denied,* 516 U.S. 1164, 116 S.Ct. 1055, 134 L.Ed.2d 199 (1996)(one-day interval between *Miranda* warning and waiver did not render statement inadmissible). There was no *Miranda* violation in the manner in which Bogison and Eubanks began their interview of Sechrest on June 14, 1983.

As the interview began, Sechrest made some ambiguous statements about his desire to proceed. In particular, Sechrest said he had spoken with his attorney and had been advised to keep his mouth shut. In response, Bogison said: "Well, there is nothing we can do to alter that, ... do you want to talk to me?" Sechrest replied: "I will tell you what, I will make a deal -- no, I won't make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won't." Bogison then asked: "Does

this mean you want to talk to us?" Sechrest replied: "Yes." There was no *Miranda* violation in this exchange. Sechrest's statements referring to his counsel certainly were not unambiguous requests to speak with counsel. The officers, therefore, were not required to stop the interview at that point. *See Davis v. United States,* 512 U.S. 452, 459-462, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); *Edwards v. Arizona,* 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Clark v. Murphy,* 331 F.3d 1062, 1069-72 (9th Cir.), *cert. denied,* __ U.S. __, 124 S.Ct. 446, 157 L.Ed.2d 313 (2003). Bogison properly asked questions to clarify Sechrest's ambiguous statements. *See Davis,* 512 U.S. at 461 ("Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney .... Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel.").

Furthermore, when Sechrest stated that he wished to call his grandmother and his attorney, that request was honored. After Sechrest completed his call to his grandmother, the officers properly inquired whether Sechrest still wished to call his attorney. *See Davis,* 512 U.S. at 461. Sechrest responded that he did not want to call his attorney; rather, Sechrest stated that he wished to "get this off [his] chest."

The Court concludes that, after receiving proper *Miranda* warnings, and after voluntarily, knowingly, and intelligently waiving his rights, Sechrest went on,

voluntarily, to make statements that included his confession to the murders of Maggie and Carly. There was no Fifth Amendment violation.[7]

Sechrest has not identified any particular factual issue that would be subject to further proof at an evidentiary hearing, and he does not make any showing that he could offer further support for Ground 3 at such a hearing. The Court finds that an evidentiary hearing on Ground 3 is unwarranted. *See Beardslee v. Woodford*, 358 F.3d 560, 585 (9th Cir. 2003); *see also Morales v. Woodford*, 336 F.3d 1136, 1151-53 (9th Cir. 2003).

The Court shall deny habeas corpus relief with respect to Ground 3.

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[7] Sechrest states, in his arguments, that he was represented by counsel when he was questioned on June 14, 1983. *See, e.g.*, Third Amended Petition, p. 16, lines 16-18, and p. 17, lines 15-16; Traverse, p. 21, lines 23-25. Sechrest does not, however, make a separate Sixth Amendment claim on the basis. Such a Sixth Amendment claim would be unavailing. The Sixth Amendment right to counsel is offense-specific, and it does not attach until the initiation of adversary judicial proceedings against the suspect. *See Texas v. Cobb*, 532 U.S. 162, 167-68, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001); *McNeil v. Wisconsin*, 501 U.S. 171, 175-76, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); *United States v. Hayes*, 231 F.3d 663, 669-75 (9th Cir.2000), *cert. denied*, 532 U.S. 935, 121 S.Ct. 1388, 149 L.Ed.2d 312 (2001). On June 14, 1983, when Sechrest confessed to the murders of Maggie and Carly, he had not yet been charged with those murders; therefore, his Sixth Amendment right to counsel could not have been violated in connection with that confession.

D. Ground 4 - Sechrest's Claim that His Fifth Amendment Right Against Self-Incrimination Was Violated By the Admission into Evidence of the Testimony of Dr. Gerow.

In Ground 4, Sechrest contends that, at the penalty phase of his trial, the admission of the testimony of Dr. Lynn Gerow, a psychiatrist, deprived him of his Fifth Amendment right to not incriminate himself. *See* Third Amended Petition, pp. 19-25. Sechrest relies primarily upon the case of *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), in making this claim.

The Nevada Supreme Court found the facts regarding Dr. Gerow's testimony to be as follows:

> The primary witness for the State at the penalty phase of Sechrest's trial was Lynn M. Gerow, a psychiatrist. Gerow had originally been appointed as an expert by the court at the request of defense counsel. Gerow had examined Sechrest and submitted a report of his findings to defense counsel. The defense decided not to call Gerow as a witness in the penalty phase, but acquiesced to the State's request to call Gerow. Among other things, Gerow's testimony indicated that Sechrest was an incurable sociopath, who had an extensive history of criminal activity and drug use.

Opinion, Exhibit 113, p. 2; *see also* Exhibit 103, p. 2 (decision of state district court).

Sechrest does not challenge the state court's findings that Dr. Gerow examined Sechrest at the

request of Sechrest's counsel, and testified at the penalty phase of the trial with the acquiescence of Sechrest's counsel. Those findings carry a presumption of correctness. *See* 28 U.S.C. § 2254(d) (pre-AEDPA). Moreover, there is substantial evidence in the record to support those findings. *See, e.g.,* Exhibit 45, p. 4 (transcript of penalty phase of trial); Exhibit 95, pp. 24-25, 33-34, 75-76, 99-100. This Court accepts those facts as true.

In *Estelle,* a Texas trial court *sua sponte* ordered the defendant, charged with murder, to undergo a psychiatric examination to determine his competency to stand trial. *Estelle*, 451 U.S. at 456-57. The defendant was found competent, was tried, and was convicted. *Id.* At the penalty phase of the trial, the prosecution called the examining doctor to testify as to the defendant's future dangerousness, which, under Texas law, had to be proved beyond a reasonable doubt before the death penalty could be imposed. *Estelle,* 451 U.S. at 458-60. The Supreme Court held that the defendant's "Fifth Amendment rights were violated by the admission of [the doctor's] testimony at the penalty phase." *Estelle,* 451 U.S. at 468. The Court instructed that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Estelle,* 451 U.S. at 468.

This case is different from *Estelle* in an important respect: in *Estelle,* the testifying psychiatrist's examination of the defendant was ordered *sua sponte* by the court, and the psychiatrist was called by the prosecution to testify, over the defendant's objection;

in this case, Dr. Gerow's examination of Sechrest was performed at the request of Sechrest's counsel, and the prosecution called Dr. Gerow to testify with the approval of Sechrest's counsel. Under the circumstances in this case, the Court finds *Estelle* to be inapposite.

The State of Nevada did not violate Sechrest's Fifth Amendment rights in connection with Dr. Gerow's examination of Sechrest or in connection with his testimony at the penalty phase of the trial. *See Buchanan v. Kentucky,* 483 U.S. 402, 422-23, 107 S.Ct. 2906, 97 L.Ed.2d (1987) (finding no Fifth Amendment violation, and distinguishing *Estelle,* in part, on the basis that in *Buchanan* the petitioner's counsel joined in the motion for the psychiatric examination); *United States v. Roston,* 986 F.2d 1287, 1292 (9th Cir. 1993) ("The question is whether the person with whom the defendant speaks is involved 'on behalf of the state....'") (quoting *Jones v. Cardwell,* 686 F.2d 754, 756 (9th Cir. 1982)); *Williams v. Vasquez,* 817 F.Supp. 1443, 1466 (E.D.Cal. 1993) *affirmed,* 52 F.3d 1465 (9th Cir. 1995) ("On the other hand, incriminating statements made during a *voluntary* psychiatric examination held for the purpose of establishing a diminished capacity or insanity defense are not compelled within the meaning of the Fifth Amendment."); *see also Washington v. Murray,* 952 F.2d 1472, 1488 (4th Cir. 1991); *Riles v. McCotter,* 799 F.2d 947, 953-54 (5th Cir. 1986); *Jackson v. Anderson,* 141 F.Supp.2d 811, 866-67 (N.D.Ohio 2001).

Sechrest does not make any showing warranting an evidentiary hearing on Ground 4. *See Beardslee v. Woodford,* 358 F.3d 560, 585 (9th Cir. 2003); *see also*

Morales v. Woodford, 336 F.3d 1136, 1151-53 (9th Cir.2003).

The Court shall deny habeas corpus relief with respect to Ground 4.

E. Ground 5 - Sechrest's Claim that He Was Denied His Sixth Amendment Right to Effective Assistance of Counsel as a Result of His Trial Counsel's Failure to Prevent or Prepare for Dr. Gerow's Testimony.

In Ground 5, Sechrest asserts that his Sixth Amendment right to effective assistance of counsel was violated as a result of his "trial counsel's failure to prevent or prepare for Dr. Gerow's testimony." Third Amended Petition, p. 25, lines 13-15.

The legal standard for evaluating a claim of ineffective assistance of counsel comes from *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard consists of two parts: first, the petitioner must show that his counsel's performance was deficient; second, the petitioner must show that counsel's deficient performance caused him prejudice.

With respect to the performance component of the *Strickland* test, the petitioner bars the burden of demonstrating that his counsel's performance was so deficient that it fell below an "objective standard of reasonableness." *Strickland,* 466 U.S. at 687-88. The *Strickland* decision included the following guidance with respect to the question of the objective reasonableness of counsel's performance:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac,* 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana,* [350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689-90; *see also Murtishaw v. Woodford,* 255 F.3d 926, 939 (9th Cir. 2001), *cert. denied,* 535 U.S. 935, 122 S.Ct. 1313, 152 L.Ed.2d 222 (2002) (the petitioner "bears the heavy burden of proving that counsel's assistance was neither reasonable nor the result of sound trial strategy").

In a federal habeas corpus action, the performance component of the ineffectiveness inquiry is a mixed question of law and fact subject to *de novo* review. *Strickland,* 466 U.S. 698; *see also Bonin v. Calderon,* 59 F.3d 815, 825 (9th Cir. 1995). However, "state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d)." *Strickland,* 466 U.S. at 698.

The Nevada courts found that Dr. Gerow examined Sechrest at the request of Sechrest's counsel, and that he testified at the penalty phase of the trial with the acquiescence of Sechrest's counsel. *See* Exhibit 103, p. 2 (decision of state district court); Exhibit 113, p. 2 (opinion of Nevada Supreme Court); *see also* Exhibit 95, p. 24, line 16 - p. 25, line 17; p. 75, line 8 - p. 76, line 4; p. 80, line 22 - p. 82, line 1; p. 99, line 18 - p. 100, line 1 (testimony of Don Aimar, Sechrest's counsel, at November 8, 1990 evidentiary hearing). Those factual findings are presumed correct pursuant to 28 U.S.C. § 2254(d) pre-AEDPA). The Court does not understand Sechrest or respondents to challenge those findings.

The state courts' rulings appear to find that Sechrest's counsel could have prevented Dr. Gerow from testifying had he wished to do so. *See* Exhibits 103 and 113; *see also* Exhibit 95, p. 32, line 16 - p. 34, line 7; p. 73, line 10 - p. 74, line 3; p. 75, lines 20-23 (testimony of Don Aimar); p. 114, lines 6-11 (testimony of Fred Atcheson); p. 136, line 11 - p. 137, line 7 (testimony of Dennis Widdis); p. 172, lines 11-14 (testimony of Robert Witek). The Court does not understand Sechrest, or respondents, to challenge the state courts' conclusion on this point. This Court

accepts this conclusion to be correct for purposes of this analysis.

In analyzing Ground 5, with respect to the performance component of the *Strickland* test, the key questions are whether Sechrest's counsel, Don Aimar, performed ineffectively -- below an objective standard of reasonableness -- in his decision to allow the prosecution to call Dr. Gerow as a witness or in the manner in which he prepared for Dr. Gerow's testimony. These are mixed questions of law and fact resolved *de novo* by this Court.[8]

The Court first considers the information that Aimar had available when he agreed to allow the prosecution to call Dr. Gerow as a witness. Counsel had available a report, dated August 5, 1983, prepared by Dr. Gerow. *See* Exhibit 92 (a copy of Dr. Gerow's August 5, 1983 report is attached to Exhibit 92 as Exhibit A); *see also* Exhibit 95, p. 25, lines 18-23 (testimony of Aimar). The report, addressed to Aimar, and marked "Confidential," stated:

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[8] Sechrest asserts that the state-court ruling that his counsel was ineffective is *res judicata*. *See* Traverse (docket #126), p. 31, lines 10-16, and p. 33, lines 8-11. Sechrest's argument in this regard is erroneous. "Habeas corpus has always differed from ordinary civil litigation, however, in one important respect: The doctrine of *res judicata* has never been thought to apply." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 15, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992) (O'Connor, J., dissenting) *see also Sanders v. United States*, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) ("The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ."); *see also, generally*, Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure*, § 28.2 (4th ed. 2001).

At your request I examined Mr. Sechrest on August 3, 1983. As you know, he is a twenty-two year old, white male presently incarcerated in the Glendale Detention facility. He is charged with two counts of kidnapping. He plans to plead not guilty to these charges.

Mr. Sechrest's criminal history is quite extensive. He has had charges of burglary, possession of stolen property, and possession of marijuana in Illinois, Kentucky, California, and Nevada. Some charges against him occurred as a juvenile. Other charges were dropped. He did spend some time in a detention center in Illinois for about nine months. He served three months in the State Department of Corrections in Illinois prior to his elopement. He is presently on probation in the State of Nevada for a gross misdemeanor.

The psychiatric history is benign. He had a brief psychological evaluation when he was convicted and sentenced in Illinois. Psychiatric treatment was "forced on us" -- while he was in the Decator Detention facility. Mr. Sechrest says about that experience "we had to admit we had a problem. I didn't like the pressure. That is why I escaped." He has never been in a psychiatric hospital. He denies a family history of mental disorder. He has a history of head injuries, but upon closer examination, these appear to have been fairly minimal and without sequelae.

Ricky Sechrest was born in Monticello, Illinois on July 20, 1961. He has a half-sister.

He grew up "all over" meaning Illinois, Nevada, and California. he was raised by his mother, grandmother, and father all in separate households. He started his freshman year at Sparks High School but dropped out. He started high school again in Illinois, but this was interrupted by his being placed in the juvenile authority. Medically, he has a history of peptic ulcers. He takes Maalox for this. He has not been in the military. He was never married. When employed he does odd jobs. He prefers warehouse work, but says that he "has never been employed in a basic position". He smokes heavily but only drinks occasionally. He uses marijuana extensively and has tried LSD, cocaine, hashhish, PCP, and speed.

On examination the mental status reveals a normal stream of mental activity. He discusses the alleged offense in a matter-of-fact fashion. He makes poor eye contact. The mental content reveals no thought disorder, ideas of reference or influence, or auditory hallucinations. There is no affective disturbance. He is mildly anxious. He describes himself as a "ball of nerves". There is no orientation disturbance. He states he has some minor memory impairment as a result of his marijuana use. Regarding the alleged offense he states that some of his memory about it is poor, and that "it fades in and out". At times his memory, however, regarding the alleged offense is "vivid". He denies using drugs or alcohol the day of the alleged offense. His judgment by history manifests poor impulse control. His intelligence is within the normal range.

> Based on this evaluation it is my opinion that Ricky David Sechrest understands the charges pending against him and can assist his counsel in the preparation of possible defenses. Furthermore, it is my opinion that he was responsible at the time of the alleged offenses and at the time of his statements to the police. There was no diminished capacity at the time of the alleged crimes nor at the time of waving his right to remain silent. He has had some minor periods of memory impairment secondary to marijuana use, but these neither impair his competency, nor do they provide a psychiatric defense. Mr. Sechrest does not have a multiple personality but does have a polymorphous perversion. He has had an unstable family history, but how this relates to his sexual offender status is not clear given the minimal information that we have developed at this time.
>
> I do have further information in my file. If I can be of further assistance to you, please feel free to call.

Exhibit 92.

Furthermore, the Nevada Supreme Court found that "defense counsel did communicate with Gerow several times before the State indicated its desire to use Gerow as a witness." Exhibit 113, p. 2. The Court presumes this finding to be correct, and Sechrest does not appear to contest it.

Aimar testified, at the November 8, 1990 evidentiary hearing, that he "spoke to Dr. Gerow on

the telephone in regards to the report both prior to the examination and afterwards." Exhibit 95, p. 26, lines 7-8. Aimar also testified: "Well, I spoke to him after the report and prior to trial. I don't recall specifically how many times or on what dates." *Id.*, p. 26, lines 11-13; *see also id.*, p. 27, lines 5-8; p. 28, lines 7-13, p. 30, lines 18-22; p. 50, lines 1-10; p. 51, lines 13-15; p. 64, lines 7-17. Aimar testified further, on cross-examination, as follows:

> MR. HATLESTAD [DEPUTY DISTRICT ATTORNEY]: I am just going to look for some guidance. What I have here is a document prepared by Mr. Aimar so that he could be paid in his representation. It is in the case file which I think I made a record in terms of making it a part of the complete record in this case. Do you want this separately designated as an exhibit for this proceeding?
>
> THE COURT: No, I don't think so.
>
> BY MR. HATLESTAD:
>
> Q. All right. I am going to ask you a few questions about this Mr. Aimar?
>
> A. All right.
>
> Q. Would you take a look at that and see if you recognize it.
>
> A. It appears to be a copy of the claim that I submitted for the time put in in this case.
>
> * * *

Q. I would like to direct your attention to that document that I showed you. And if you will real briefly skip through that and notice how many times you talked to Dr. Gerow in terms of consulting with him?

A. On a quick review, I see there is at least three conversations with him. There was a letter to him that I crafted, review of his reports, there could be a fourth conversation here that I see.

Q. At least three, maybe four times?

A. That I can find right now.

Exhibit 95, p. 78, line 19 - p. 79, line 9; p. 83, lines 13-22; *see also id.*, p. 97, line 5 - p. 98, line 3.

Based upon the report prepared by Dr. Gerow, and Aimar's three or four conversations with Dr. Gerow, Aimar made the decision to allow the prosecution to call Dr. Gerow as a witness at the penalty phase of the trial.

The penalty phase of the trial was held on September 26 and 27, 1983. *See* Exhibit 45 (transcript). Dr. Gerow was the first witness called by the State. Exhibit 45, p. 2.

Dr. Gerow testified that he is a psychiatrist, and had practiced for 13 years. *Id.* at 3. He testified that he was in private practice and also an associate clinical professor of psychiatry at the University of Nevada Medical School. *Id.* He was found by the court to be qualified as an expert in the field of psychiatry. *Id.* at 3-4.

Dr. Gerow testified that he had examined Sechrest on August 3, 1983, a little less than two months prior to his testimony. Exhibit 45, p. 4. Dr. Gerow testified that he performed the examination at the request of Aimar. *Id.*

The prosecutor then made a record that Aimar had acquiesced to the State calling Dr. Gerow as a witness:

> MR. LANE [prosecutor]: Your Honor, if it please the Court, I would like to put this on the record for the benefit of the record. Mr. Aimar has agreed that even though he requested the examination on the particular issues that I want to call Dr. Gerow for, he has no objection, is that correct, counsel?
>
> MR. AIMAR: No objection.
>
> THE COURT: All right.

Exhibit 45, p. 4, line 25 - p. 5, line 1.

The prosecutor went on in his questioning to establish that Dr. Gerow had reviewed several documents related to the case and had some familiarity with the case. Exhibit 45, p. 5.

The questioning then turned briefly to the matter of Sechrest's criminal record:

> Q. Did you find that he had an extensive criminal history?
>
> A. Yes.

Q. As a matter of fact, did you find that he had charges of burglary, possession of stolen property, possession of narcotics in Illinois, Kentucky, California and Nevada? That is in your report is it not?

A. That's correct.

Exhibit 45, p. 5, line 26 - p. 6, line 2.

The direct examination of Dr. Gerow then proceeded as follows:

Q. Now, can you tell us a little bit about the person, I am talking about a clinical point of view, a psychiatric point of view, a little bit about the person of Mr. Sechrest from a psychiatric point of view?

A. Well, basically we are talking about a young man who had an unstable family background, who got into trouble with the law early in his life, dropped out of school and had a series of detentions in various facilities in Illinois and California. Basically he has been unsocialized most of his life.

Q. Doctor, let me ask you this: Can you tell the jury what you believe his regard for human life is?

A. I only have the same basis that the jury has, you know, for drawing that conclusion. Of course, my interview with him. I would say he has a callous disregard for human life.

Q. Is there a term in the field of psychiatry known as a sociopath or psychopath?

A. Yes.

Q. Are people who are sociopaths, can they be considered dangerous?

A. Sometimes.

Q. Let me ask you this? You recognize, do you not, the Psychiatric Glossary as a book in the field which defines certain psychiatric terms?

A. Yes.

Q. If I read from the Psychiatric Glossary the following, talking about a sociopath: "A personality disorder characterized by basic lack of socialization and by behavior patterns that bring the individual repeatedly in conflict with society. People with this disorder are incapable of significant loyalty to individuals or groups or social values and are grossly selfish, callous, irresponsible, impulsive and unable to feel guilt or to learn from experience and punishment. Frustration tolerance is low. Such individuals tend to blame others or offer plausible rationalization for their behavior."

That would be a definition of a sociopath, would it not?

A. Yes.

Q. As a matter of fact, in your report, you refer to Mr. Sechrest as having poor impulse control, Page 2 second paragraph at the end?

A. Yes, I did.

Q. Would you say, Dr. Gerow, from what we know happened, and from your examination of Mr. Sechrest, that at least insofar as young children are concerned, little girls, that this man could be considered dangerous?

A. Well, yes, I would.

Q. All right. Now, you testified briefly about his background with his family, et cetera. Dr. Gerow, it is true, is it not, there are a great many people in the world, in this country, that have poor family backgrounds, that have little or no education, that have had a tough life coming up, but that are, in fact, good, productive people; isn't that true?

A. Yes.

Q. He cannot be considered one, can he?

A. Good, productive person?

Q. Yes.

A. No, sir.

Exhibit 45, p. 6, line 3 - p. 7, line 30.

Aimar then cross-examined Dr. Gerow. Exhibit 45, pp. 8-20. Aimar used much of the cross-examination to elicit information regarding Sechrest's family history. That aspect of the cross-examination included the following:

> Q. Doctor, what kind of a family history did Mr. Sechrest give you?
>
> A. He described growing up what he said was all over, meaning California, Nevada and Illinois, because he lived with his mother for a time, then with his father, then his grandmother. It was a rather unstable kind of background.
>
> Q. Did he explain how he ended up living with these numerous relatives or did you inquire?
>
> A. He would get into repeated difficulty with the law, and they would lose interest in him, or they would run out of patience with him, and they would move him about telling him to live with someone else.
>
> * * *
>
> Q. Do you know how long he lived with his real father?
>
> A. I don't know for sure.
>
> Q. Do you know how long he lived with his real mother?
>
> A. No.

Q. Do you know what his relationship was with either of those parents?

A. With his mother he said it was quite strained.

Q. Did he say whether she rejected him?

A. He said that she threw him out.

Q. Did he say whether she loved him?

A. He didn't say that she loved him.

Q. Did he say that about his father?

A. He didn't say much about his father.

* * *

Q. .... Do you know why he was in Illinois?

A. His grandmother lived there in Illinois.

Q. Was he not living with his parents or either of them then?

A. I believe his mother was here.

Q. Do you know why he wasn't living with his mother at that point or did you inquire?

A. Well, I think I indicated that he moved about a lot because people were fed up with his behavior, and they would ask him to live with someone else.

Q. This is what he told you or what you drew as a conclusion?

A. Partly what he told me, that is his mother threw him out. But I also took some license in concluding that, too.

* * *

Q. Did Mr. Sechrest talk anything about his stepparents, his stepfathers?

A. He talked about his current stepfather.

Q. What do you recall said about that?

A. Apparently he was instrumental in throwing Mr. Sechrest out of the home.

Q. Did Mr. Sechrest say whether or not he had ever been the victim of any kind of spankings or beatings by his parents?

A. He indicated that a stepfather -- I am not sure if it is the gentleman I mentioned -- that there was some callous behavior directed towards him by his stepfather.

* * *

Q. Did he say that he had loved any other people?

A. Yes.

Q. Do you think that was true?

A. Yeah, I accept he feels he loves some other individuals.

Q. Did you have an opinion as to whether he had love for his mother?

A. He didn't indicate that.

Q. How about for his real father?

A. He didn't indicate that.

Q. How about for his grandmother?

A. Didn't indicate that.

Q. Did you inquire?

A. Yes.

Q. He didn't answer it or --

A. He didn't indicate. He referred to his sister only, his half-sister.

Q. Okay.

A. Who he felt was an important person to him at this time in his life.

Q. Had he seen his sister at all, do you know?

A. He had been deprived of seeing her because he was thrown out of the house.

Q. Do you know whether that was all his fault that he was thrown out of the house?

A. I don't know whose fault it was.

Q. So from your inquiry, it could have been the fault of the parents as well as it could have been the fault of Mr. Sechrest?

A. Of course.

See id. at p. 8, line 6 - line 17; p. 8, line 25 - p. 9, line 7; p. 12, line 27 - p. 13, line 7; p. 13, line 23 - p. 14, line 21.

With regard to Dr. Gerow's opinion that Sechrest was a sociopath, Aimar used the cross-examination to establish that Sechrest had received no counseling, training, or therapy for that disorder. Exhibit 45, p. 11, lines 13-15.

Aimar, in his cross-examination, also elicited from Dr. Gerow information that tied Sechrest's sociopathy to deprivations in his childhood:

Q. By an antisocial personality, what would bring that about? What factors cause that?

A. Of course no one knows for sure, but the theory is that it comes about as the result of deprivation in childhood, particularly very serious deprivation in the first year of life.

Q. Deprivation of what?

A. Deprivation of usually the mother, but in some cases some other caretaker who is responsible for the child.

Q. By deprivation of the mother, you mean that the mother wasn't there or did not do something like feed him?

A. The mother is usually there but not really engaged with the infant, doesn't care for him, love him, look at him, you know, caress him and do the things normal mothers do with children.

Q. And this, you think, is often found in the first year of life?

A. Yes.

Q. What is the effect if it continues?

A. It doesn't have to continue. If it occurs the first year of life, there is a very good chance the child will have a sociopathic personality.

Q. If it does continue, if the mother continues to show a lack of affection or a disregard for her child, what continuing problems might develop in a person such as Mr. Sechrest?

A. Really, it is not terribly important after the first year of life. One would expect that if it goes on during the first year of life, it is likely to continue. There is no reason to expect that a mother would change because a child becomes a year old. But the basic pathology is there. The basic personality subtraits have occurred and --

> Q. Is it your feeling then that the mother did not show him any love and affection in that early period of life?
>
> A. If she was the important person available to him at that time. I don't know whether he was with his mother, grandmother or someone else at that time.

Exhibit 45, p. 11, line 21 - p. 12, line 26; *see also* Exhibit 45, p. 22, line 19 - p. 23, line 9 (redirect examination of Dr. Gerow).

On the cross-examination of Dr. Gerow, with respect to Sechrest's criminal record, counsel established that there was no indication of any crimes of violence in that record. Exhibit 45, p. 9, lines 14-16.

Aimar also used the cross-examination to suggest a theory as to why Sechrest did not confess earlier to the killings:

> Q. Now, how about the next question then, would his drug usage have caused any kind of a selective memory regarding an incident such as the May 14th murders that he is convicted of, after the fact?
>
> A. I guess you and I look at selective memory a little differently. To me it is a volitional thing. If he selects not to remember, not to tell or says he forgets, that is within his will to say those things. But certainly the drugs don't cause him to do that.

Q. Can people who find something that is so bad put it out of their mind and actually forget for a while?

A. Frequently.

Q. If a person did that, would they show any signs that they were hiding it intentionally or would it actually appear that they had forgotten it to an observer like yourself?

A. If they suppress it or repress it it is not available to their memory at that moment when you are discussing it with them, and it appears that they have forgotten.

Q. Is it possible that Mr. Sechrest could have put the event of May 14th out of his mind for a few weeks after the event, and other people around him they would not have perceived that he had anything to do with the crime?

A. I don't know if you can draw that conclusion.

Q. Is it possible though?

A. It is possible that he could have put them out of his mind. As to what perceptions others made of him, I couldn't comment.

Q. But what he would be projecting would not have been that he was covering up something then?

A. You mean for a couple of weeks because he might have forgotten, he didn't appear guilty?

Q. Right.

A. That's possible.

Q. In a situation like that, do sometimes other external things cause people to bring back their memory? Say he was shown a picture or reminded of an incident that relates to the May 14th killings, could that have triggered him to have a full recall or reasonably full recall of the events that had been put out of his mind?

A. Certainly things might have occurred or people could have said things to him that would have started his memory up again, yes.

Exhibit 45, p. 15, line 15 - p. 16, line 26; *see also* Exhibit 45, p. 20, line 8 - p. 21, line 19 (redirect examination of Dr. Gerow).

In his state-court post-conviction petition, Sechrest asserted his claim that Aimar was ineffective with respect to his handling of Dr. Gerow. *See* Exhibits 80 and 92. The state trial court held a hearing on that claim on November 8, 1990. *See* Exhibit 95 (transcript).

Aimar testified at the November 8, 1990 evidentiary hearing. His testimony included the following:

Q. What were the things that were favorable if you remember?

A. Well, it seems to me that one of the reasons that I felt that he was an okay witness and I

didn't object to it coming in the way it did was it went to show some of the background conditions of Mr. Sechrest. And in a penalty phase, the type of evidence that are admissible is a lot broader than a guilt phase. As such, those factors could have been something that would be sufficient to add up to become mitigating factors which would be one of the findings that a jury has to do to avoid a death penalty.

* * *

Q. Do you consider it [Dr. Gerow's testimony about Sechrest's criminal record] damaging?

A. Well, I suppose that any evidence of conviction of a crime is damaging. There are certain circumstances where that evidence also is relevant, and in fact may be necessary to the case from the point of view of showing some of the background of Mr. Sechrest.

Q. Okay. So at the time, do you have a memory as to whether or not you felt that evidence was necessary as a tactical decision for your defense at the penalty phase?

A. I felt the evidence wasn't objectionable and I also believe it was a part of the basis of the doctor's report.

Q. Is it your opinion that prior --

THE COURT: Can I ask a question in this area because this is important? Mr. Aimar, at least logically or plausibly, prior offenses or

misconduct amounting to burglary, stolen property or narcotics use could support some kind of an argument that the individual committing these crimes is a person who is devoid of character and conscience, and it would be an aggravating [circumstance]. It seems to me that arguably since none of these crimes necessarily involve a proclivity for violence, they also could be argued to support a position that they show the kind of troubled youth that this individual had. What I want to ask you is what was going on in your mind, if anything, relative to the admission of this kind of evidence at the time that you were defending him in the penalty phase?

THE WITNESS: Well, as I recall from some of the other testimony, and again my memory of exactly what was said, that some of these things had come out or would be coming out such as through the grandmother's testimony talking about his troubled life. I felt that this type of background information did help show his troubled youth and was relevant to showing that a lot of these problems may be factors of a bad upbringing, and we were hoping that the jury would find some mitigating aspect of it. I am not sure if that answers your question, because I am not sure I understand it.

* * *

THE WITNESS: I think, as a follow-up to that if I might, as I recall, some of the information we were presenting and showing the troubled life of Mr. Sechrest showed that he had ended

> up in homes, juvenile homes or something like that, it seems to me in Illinois perhaps, and that this information about how he was there kind of tied in. It would be sort of hard to establish he had been put into a juvenile facility without some information that there may have been some crime or juvenile offense. And I am not sure, but that may be a further aspect of what would help answer your question, Your Honor.

Exhibit 95, p. 30, lines 7-17; p. 38, line 14 - p. 40, line 13. On cross-examination, Aimar testified further, as follows:

> Q. Now you have testified already that you did not intend to call Dr. Gerow as a witness at all?
>
> A. That's correct.
>
> Q. Basically, you can say that he was mainly a consultant for you at that time?
>
> A. After the report, then it was my intent that that would be his purpose.
>
> Q. Based on what occurred just as the penalty hearing was taking place, that position changed and you decided that he could be a witness?
>
> A. Correct.
>
> Q. What I would like to know the, Mr. Aimar, is what occurred that made you change that position?

A. As I said, Mr. Lane contacted me about using Dr. Gerow for a witness, and after discussing it with Mr. Lane, I felt there might be some value in what Dr. Gerow could present that would work on our penalty phase hearing. So I agreed to allow that.

Q. Now the report that was filed and submitted to you by Dr. Gerow obviously had some shall we say damaging information in it correct?

A. Are you referring to the one that was provided?

Q. Yes?

A. It would have information that would be have a bearing on possibly the guilt phase as well as possibly the resultant penalty phase.

Q. Does that report in your opinion also contain information which in your belief constitutes evidence of migration?

A. I think it helps shows some of the things that I felt we were trying to establish at the penalty phase which was the troubled childhood and difficulty with the family life.

Q. Knowing those two things, did you weigh the two and then make a decision about allowing the State to present Dr. Gerow?

A. I felt that on balance it would be appropriate. It is possible that I should have called him, but I probably feel the information brought in

overall helped serve the purpose we were trying to accomplish.

Q. Is it fair to say you used a tactical decision at that point?

A. I guess you could call it that.

* * *

Q. Isn't it true then part of your strategy in this case was to show even though he had committed these property offenses, he was not a violent person and therefore that was a mitigating circumstances?

A. I think it was more in terms of showing there were a lot of problems in his life and some of them manifested with these particular events, but certainly there was nothing in his background that would have come to the level of the crime that he was convicted of.

* * *

Q. ... [A]s of the time in 1983 when you defended Mr. Sechrest, do you believe that the decisions that you made were the right ones?

A. I think they were the best decisions that I could make under the circumstances, and I think that, hope what my efforts were was to give him his legal rights to adequate representation. That is subject to review by someone other than me.

Id., p. 83, line 23 - p. 85, line 16; p. 87, line 21 - p. 88, line 5; p. 95, line 21 - p. 96, line 4.

In his testimony at the November 8, 1990 evidentiary hearing, Aimar acknowledged, in hindsight, that some of Dr. Gerow's testimony was damaging to the defense, and that he was not happy with Dr. Gerow's testimony. Exhibit 95, p. 54, lines 10-15; p. 55, lines 19-20; p. 57, lines 1-3; p. 74, lines 7-15; p. 102, lines 5-8; p. 106, lines 3-4. Aimar also testified that some of testimony that was harmful to the defense was stronger than what he had anticipated given his conversations with Dr. Gerow and his review of Dr. Gerow's report. *Id.*, p. 74, lines 16-20. However, that exercise of hindsight by Aimar does not go to the central issue: did Aimar make a reasonable tactical decision, based on a reasonable investigation, to allow the prosecution to call Dr. Gerow as a witness? This Court concludes that he did.

While Aimar did not talk to Dr. Gerow after he decided to allow the prosecution to call him as a witness -- *see, e.g.*, Exhibit 95, p. 36, lines 8-10, and p. 100, lines 2-18 -- Aimar did clearly obtain a significant amount of information regarding Dr. Gerow's opinions. It is evident from the testimony of Aimar at the November 8, 1990 evidentiary hearing that he contemplated the possibility of Dr. Gerow testifying at the penalty phase of the trial well before the penalty base began. *See* Exhibit 95, p. 82, lines 2-23. Aimar had Dr. Gerow's report. *See* Exhibit 92; *see also* Exhibit 95, p. 25, lines 18-23 (testimony of Aimar). And, in addition, Aimar spoke with Dr. Gerow at least three times. *See* Exhibit 95, p. 26, lines 5-13; p. 27, lines 5-8; p. 28, lines 7-13, p. 30, lines 18-22; p. 50, lines 1-10; p. 51, lines 13-15; p. 64, lines 7-17; p. 78,

line 19 - p. 79, line 9; p. 83, lines 13-22; p. 97, line 5 - p. 98, line 3. The fact that those conversations may have taken place one to two months before trial does not necessarily mean that Aimar was ill prepared to make the decision whether Dr. Gerow should testify, or ill prepared to examine him at trial.

It is also evident that Aimar considered the information that he had about Dr. Gerow's opinions and made a reasoned tactical choice to allow the prosecution to call him as a witness. Aimar believed that Dr. Gerow's testimony would be a useful vehicle to show the difficulties that Sechrest had in his family life and in his past in general. Aimar's testimony shows that he -- legitimately, it seems -- believed that there would be no way to show the difficulties in Sechrest's background without the jury hearing something about Sechrest's criminal record. Aimar recognized that there were no crimes of violence in Sechrest's criminal record. Aimar's testimony shows that he balanced the pros and cons of Dr. Gerow's anticipated testimony and concluded that he should allow that testimony to come in.

It is easy to second-guess Aimar's decision. However, it is not for this Court to judge the wisdom of Aimar's tactical decision in retrospect. Rather, this Court must determine whether Aimar actually made such a tactical decision, and whether he made it based upon reasonably sufficient information.

At the November 8, 1990 evidentiary hearing, Sechrest presented testimony of Mills Lane, then the District Attorney of Washoe County, Nevada. Exhibit 95, pp. 4-21. Mr. Lane testified as follows:

> Q. Do you ever put witnesses on the stand such as Gerow without having taken time to go and speak with them?
>
> A. Lord no. If you do, you are guilty of malpractice.

Exhibit 95, p. 8, lines 5-7. The question that Mr. Lane answered, however, did not reflect the facts in this case. Aimar did "[take] time to go and speak with" Dr. Gerow. The fact that he did so one to two months before trial does not necessarily render Aimar's performance ineffective.

Mr. Lane also testified as follows:

> Q. ... if he [Aimar] could have stopped you, hypothetically, from using Dr. Gerow's testimony, do you think he should have?
>
> A. That's a hard question. I am not so sure about that because it seems to me that in any lawsuit whether it be civil or criminal, the best thing a lawyer can do is to try to reflect to the jury that that lawyer is trying to get to the truth without trying to foreclose the jury's evaluation of evidence and testimony. It was clear before the jury that this man had been examined, and to foreclose the evidence and try to shield the truth from the jury, I think is a mistake. And tactically, Mr. Aimar might have felt the same way.
>
> Q. Would you consider Dr. Gerow's testimony damaging to Mr. Sechrest?

> A. Absolutely. As well as the facts. Let me say this, Mr. Lindsay: Nobody can know the answer to this, but I do not believe that if Dr. Gerow had not testified in this case, that the penalty would have been any different. This was a death case from beginning to end. It is my belief from having done it for twenty years that this was a death case. The jury was only out three hours on it, and they would have given the death penalty.

Exhibit 95, p. 20, line 4 - p. 21, line 1. This testimony by Mr. Lane adds support to the Court's conclusion that Aimar made a tactical decision -- one that was reasonable at the time -- to allow Dr. Gerow's testimony at the penalty phase of the trial.

At the November 8, 1990 evidentiary hearing, Sechrest also offered the testimony of criminal defense attorneys Fred Atcheson, Dennis Widdis, and Robert Witek. Exhibit 95, pp. 107-79. The testimony of those attorneys was based largely upon their review of the transcript of the penalty phase of Sechrest's trial. *See, e.g., id.*, p. 112, lines 8-23 (Atcheson); p. 135, lines 5-20, and p. 136, lines 3-10 (Widdis). Their testimony was composed mostly of criticism of Aimar's performance in hindsight.

There is no indication that Atcheson had any background information regarding the bases for Aimar's tactical decision to allow Dr. Gerow to testify. *See, e.g.,* Exhibit 95, p. 121, lines 12-20, and p. 122, line 22 - p. 123, line 2.

Widdis listened to Aimar's testimony regarding his decision to allow Dr. Gerow to testify, but in the direct

examination of Widdis he was repeatedly asked to assume that Aimar never spoke to Dr. Gerow. *See, e.g.*, Exhibit 95, p. 139, lines 10-12 ("Would you also consider that apparently he never talked to Dr. Gerow before letting him get on that stand."); p. 139, lines 21-23 (" ... the failure of defense counsel to interview a witness prior to allowing him to testify ...."); p. 147, lines 21-23 ("... can you think of any reason for not having talked to Dr. Gerow prior to putting him on the stand."); p. 148, lines 19-20 ("Could you know what somebody was going to say if you didn't talk to them?"). The assumption that Aimar never spoke to Dr. Gerow is unsupported by evidence; Aimar spoke with Dr. Gerow on at least three occasions. *See* Exhibit 95, p. 26, lines 5-13; p. 27, lines 5-8; p. 28, lines 7-13, p. 30, lines 18-22; p. 50, lines 1-10; p. 51, lines 13-15; p. 64, lines 7-17; p. 78, line 19 - p. 79, line 9; p. 83, lines 13-22; p. 97, line 5 - p. 98, line 3.

Witek also appears to have assumed, incorrectly, that Aimar never spoke to Dr. Gerow. *See, e.g.*, Exhibit 95, p. 171, lines 11-12 ("Do you generally talk to witnesses before you put them on the stand?"); p. 172, lines 5-7 ("... can you think of any reason that you wouldn't go talk to Dr. Gerow before you allowed Mr. Lane to call him?"). Witek's testimony, like much of the testimony of Atcheson and Widdis, did not speak to the information that Aimar actually considered when he made the tactical decision to allow Dr. Gerow to testify. *See* p. 175, lines 10-12 ("Q. Is it fair to say then that you have no idea what Dr. Gerow had to say to Mr. Aimar about this case? A. That's fair to say."); p. 179, lines 3-8 (Witek acknowledged that he did not acquire all the information that Aimar had at his disposal when he made the decision to allow Dr. Gerow to testify.).

The issue before this Court must be addressed from the perspective that counsel had when he considered whether or not to allow the prosecution to call Dr. Gerow as a witness; retrospective criticism of the outcome of that tactical decision adds little to the proper analysis.

The Court's conclusion is that, while Aimar's decision to allow Dr. Gerow to testify is susceptible to criticism in hindsight, it was a tactical decision made with the benefit of adequate information. Sechrest did not receive ineffective assistance of counsel in connection with his counsel's decision to allow Dr. Gerow to testify, or in connection with counsel's preparation for that testimony.

The Court finds some guidance in the case of *Beardslee v. Woodford,* 358 F.3d 560 (9th Cir. 2003). In that capital habeas corpus case, the federal district court denied the petitioner relief, and the Ninth Circuit Court of Appeals affirmed. The court of appeals described one of the petitioner's claims as follows:

> Beardslee argues that his trial counsel rendered ineffective assistance at the penalty phase by presenting the testimony of Dr. George Wilkinson, who testified that Beardslee was a "sociopath." Under direct examination by Beardslee's trial counsel, Wilkinson described the sociopathic diagnosis at length, listing characteristics such as unreliability, untruthfulness, and lack of remorse. On cross examination, Wilkinson admitted that sociopaths are manipulative, that some of Beardslee's representations may have been untruths, and that his prognosis for recovery in

> the immediate future was dim. Beardslee claims his attorney failed to recognize that the testimony would be harmful, failed to recognize that the diagnosis was incorrect, and failed to get a second opinion, even though funds would have been available for this purpose.

Beardslee, 358 F.3d at 582. The Court ruled on that claim as follows:

> [W]e affirm the dismissal of Beardslee's claim and request for an evidentiary hearing. Beardslee is only entitled to an evidentiary hearing if his allegations establish both deficient performance and substantial prejudice. *Turner v. Calderon,* 281 F.3d 851, 890 (9th Cir.2002). The record demonstrates his inability to do this. Beardslee's counsel understood that Wilkinson's diagnosis could be harmful, but he chose to proceed anyway because he believed the diagnosis to be reasonable. Balliet [Beardslee's trial counsel] frequently worked with Drs. Wilkinson and Fricke and had hired them to investigate the questions of competence and possible mental defenses. Moreover, Dr. Wilkinson provided useful mitigating evidence for Beardslee, including an explanation for his failure to openly show remorse, testimony on his good behavior in prison, and both physical and psychological explanations for his antisocial behavior. The fact that he also provided some damaging testimony does not mean that the decision to use him as a witness fell below an objective standard of reasonableness. Rather, it presented a strategic decision. Whether or not it may have been better to forgo Dr. Wilkinson's

> testimony, the record does not show that Beardslee's counsel failed to make reasonable decisions untethered to trial strategy.

Id. at 583.

This Court reaches much the same conclusions as the *Beardslee* court. Aim evidently understood that Dr. Gerow's testimony could be harmful, and that he had a tactical decision to make. Aimar made the tactical decision to allow the testimony of Dr. Gerow to be presented. Like the testimony of the doctor in *Beardslee,* Dr. Gerow's testimony provided some useful mitigating evidence. In the cross-examination of Dr. Gerow, Aimar was able, at least to some extent, to humanize Sechrest and perhaps to engender some compassion and understanding of him, by bringing out information regarding his family history. *See* Exhibit 45 at p. 8, line 6 - line 17; p. 8, line 25 - p. 9, line 7; p. 12, line 27 - p. 13, line 7; p. 13, line 23 - p. 14, line 21. Counsel was able to tie Sechrest's sociopathy to deprivations in his childhood. *Id.* at p. 11, line 21 - p. 12, line 26. Counsel was able to establish that Sechrest had not had the benefit of any counseling, training, or therapy. *Id.* at p. 11, lines 13-15. Counsel was able to show that there was no indication of any crimes of violence in Sechrest's criminal record. *Id.* at p. 9, lines 14-16. And, counsel was able to suggest a theory why Sechrest did not confess sooner to the murders. *Id.* at p. 15, line 15 - p. 16, line 26. The fact that Dr. Gerow also provided damaging testimony does not mean that the decision to allow him to testify fell below an objective standard of reasonableness. It was a strategic decision. Whether or not, in hindsight, it may have been better for counsel to prevent Dr. Gerow from testifying, the record does not show that counsel

"failed to make reasonable decisions untethered to trial strategy." *See Beardslee,* 358 F.3d at 583.

Furthermore, even if Sechrest's counsel did provide ineffective assistance of counsel in connection with the testimony of Dr. Gerow, upon careful review of the entire record of the trial, the Court finds that Sechrest was not prejudiced.

With respect to the prejudice prong of the *Strickland* test:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694; *see also Silva v. Woodford,* 279 F.3d 825, 836 (9th Cir. 2002). The Ninth Circuit Court of Appeals has instructed that courts must be "especially cautious protecting a defendant's right to effective counsel at a capital sentencing hearing." *Silva,* 279 F.3d at 847, *quoting Deutscher v. Whitley,* 884 F.2d 1152, 1161 (9th Cir. 1989). As stated in *Strickland*: "When a defendant challenges a death sentence ... the question is whether there is a reason; probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695.[9] The Court reviews *de*

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[9] Sechrest argues that a different standard applies. As the Court understands Sechrest's argument, he contends that ineffective

novo the state courts' determination that there was no prejudice. *See Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988); *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987).

The jury found four aggravating circumstances: (1) the murders were committed while Sechrest was engaged in the commission of or an attempt to commit kidnapping in the first degree; (2) the murders were committed while Sechrest was engaged in the commission of or an attempt to commit sexual assault; (3) the murders were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and (4) the murders involved torture, depravity of mind, or the mutilation of the victim. Exhibits 52 and 53. The jury found no mitigating circumstances. *Id.*

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assistance of his counsel caused a Fifth Amendment violation, and therefore the burden is on respondents to prove beyond a reasonable doubt that the constitutional error was harmless. *See* Third Amended Petition, pp. 35-37. Sechrest cites *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), and *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). These cases do not support Sechrest's position. Sechrest's proffer of the *Chapman* harmless-error test is puzzling; *Chapman* generally does not apply in habeas corpus actions. *See Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (holding that, in the habeas context, an error is harmless unless it is shown to have had a "substantial and injurious effect" on the jury's verdict); *see also Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir.2000), *cert. denied*, 531 U.S. 1037, 121 S.Ct. 627, 148 L.Ed.2d 536 (2000). At any rate, the Court applies *Strickland*, and concludes that Sechrest has not shown prejudice required by *Strickland*.

The testimony of Dr. Gerow did not bear on any of the aggravating circumstances found by the jury. Those aggravating factors would have weighed heavily on the side of the death penalty even if Dr. Gerow had not testified.

With respect to possible mitigation, absent the testimony of Dr. Gerow, Sechrest may have been better able to argue for mitigation on the basis of a lack of a prior criminal record. The Court, howe er, finds that this would have made little difference. As it was, Aimar was able to show that Sechrest had no crimes of violence in his criminal record; given the nature of the crimes at issue in this case, that was the main point to be made.

Also, generally, without the testimony of Dr. Gerow, Sechrest could have made a better case that he might be able to change for the better while in prison. This is where Dr. Gerow's testimony was, perhaps, most harmful to Sechrest. It was clear to the jury that Sechrest was dangerous; Dr. Gerow's testimony was that he would not change. Even here, however, the Court finds that the damage to the defense was minimal in comparison to the nature of the aggravating factors.

The jury found that the murders were committed in the course of kidnappings and sexual assaults, and that they were committed to avoid lawful arrest or effect an escape from custody. The jury found that the murders involved torture, depravity of mind, or mutilation of the victims. Sechrest took two young girls into the hills and bludgeoned them to death with rocks and a shovel. He undressed one of the girls, attempted to have intercourse with her dead body, and

when he could not, he masturbated, and ejaculated onto the girl's body. The aggravating factors found by the jury, rooted in the terrible circumstances of the killings, are such that this Court cannot find any reasonable probability that Sechrest might have avoided the death penalty if Dr. Gerow had been precluded from testifying.

The Court recognizes the interplay between the error that the Court finds in the context of Ground 1 and the error claimed by Sechrest in Ground 5. *See Ceja v. Stewart,* 97 F.3d 1246, 1254 (9th Cir. 1996) ("Multiple errors, even if harmless individually, may entitle a petitioner to habeas relief if their cumulative effect prejudiced the defendant.") (citing *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992), *cert. denied,* 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993)). Dr. Gerow's testimony was to the effect that Sechrest was dangerous and would not change; the prosecutor overstated the chances of Sechrest receiving a commutation and parole if sentenced to life without the possibility of parole. That may well have amplified to some extent the opinions of Dr. Gerow. However, even considering the error in Ground 1 together with the claimed error in Ground 5, the Court concludes that the aggregate error would still fall short of causing the kind of prejudice required by *Strickland.*

With respect to Ground 5, as with Sechrest's other claims, Sechrest has not identified any factual issue that should be subjected to further development at an evidentiary hearing. The state district court held an exhaustive evidentiary hearing. *See* Exhibit 95 (transcript). Sechrest has not made any showing of any of the circumstances described in 28 U.S.C. § 2254(d) (pre-AEDPA) warranting a further evidentiary hearing

in federal court. The Court shall not grant an evidentiary hearing with respect to Ground 5.

The Court shall deny Sechrest habeas corpus relief with respect to Ground 5.

IT IS THEREFORE ORDERED that the Third Amended Petition for Writ of Habeas Corpus in this action is **DENIED**.

IT IS FURTHER ORDERED that the Clerk shall **ENTER JUDGMENT ACCORDINGLY**.

Dated this 16 day of April, 2004.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX C

AO450 (REV. 5/85) JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

* * * * DISTRICT OF NEVADA

CASE NUMBER: CV-N-92-0536-ECR(RAM)

[Filed April 19, 2004]

RICKY DAVID SECHREST,	)
	)
Petitioner,	)
	)
v.	)
	)
JOHN IGNACIO, et al.,	)
	)
Respondents.	)
	)

JUDGMENT IN A CIVIL CASE

__ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__ **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

XX **DECISION BY COURT.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Third Amended Petition for Writ of Habeas Corpus in this action is DENIED.

It is further ordered that the Clerk shall enter judgment accordingly.

April 19, 2004

LANCE S. WILSON
Clerk

Jerry Ries /s/
Deputy Clerk

APPENDIX D

101 Nev. 360; 705 P.2d 626; 1985 Nev. LEXIS 431

Supreme Court of Nevada

No. 15320

[Filed August 27, 1985]

RICKY DAVID SECHREST, Appellant,

v.

THE STATE OF NEVADA, Respondent

Appeal from judgment of conviction of two counts of murder in the first degree and imposition of the sentence of death; Second Judicial District Court, Washoe County; John W. Barrett, Judge.

COUNSEL: *David G. Parraguirre*, Public Defender, *Jane G. McKenna*, Deputy Public Defender, Washoe County, for Appellant.

Brian McKay, Attorney General, Carson City, *Mills Lane*, District Attorney, *Illyssa I. Fogel*, Deputy District Attorney, Washoe County, for Respondent.

JUDGES: Springer, C.J., Mowbray, J., Gunderson, J., Steffen, J., Young, J.

OPINION

[*362] [**628] In April of 1983, Doris Schindler hired Zella Weaver to babysit her ten-year old daughter, Maggie Schindler. In addition to caring for Maggie during weekday afternoons and evenings at the Schindler residence, Mrs. Weaver would pick Maggie up from the Meadowood Ice Arena when Maggie was through ice skating on Saturdays.

On May 14, 1983, a neighbor of the Schindlers' drove Maggie and her friend, Carly Villa, to Meadowood and dropped them off to skate. Later that afternoon Mrs. Weaver went to Meadowood to pick up Maggie and Carly but could not find them. The police were [***2] notified, and an investigation was begun.

On June 7, 1983, the bodies of Maggie and Carly were found in Logomarsino Canyon, a remote area east of Reno, by two young men who were out shooting. The bodies, which had been covered with loose dirt, were found about 50 yards apart. A pair of ice skates and skate guards with the name "Maggie S." on them were found near one of the gravesites.

Ricky David Sechrest is Zella Weaver's grandson and lived at her home. Sechrest had been seen outside the Schindler home several times while waiting to pick up his grandmother when she finished babysitting there. The record establishes that Maggie had been at the Weaver residence before and that Sechrest knew that his grandmother routinely picked Maggie up at Meadowood Mall on Saturdays.

On June 14, 1983, Sechrest gave an inculpatory statement to Officer Bogison and Detective Eubanks of the Reno Police Department while he was being questioned at the Sparks Police Department by Sparks police on an unrelated grand larceny charge. He admitted that he had picked up Maggie and Carly from the Meadowood Mall Ice Arena. He said that he asked Maggie if she wanted to go for a ride and that she had agreed. [***3] They drove out to Logomarsino Canyon. Sechrest claimed that they were walking around the hills rock hunting when Carly fell over backward and hit her head. Sechrest said he thought the girl was dead because when he checked her pulse, she did not have one. He said Maggie began to "freak out on him" and was "between hysterical and crying." Sechrest stated that he knew it was wrong to be up there with the girls to begin with, so when Maggie began to run he panicked, caught her and hit her over the [*363] back of the head with a rock. After hitting the girl three or four more times with the rock after she had fallen, Sechrest went to his car and got a shovel. He returned to where Carly was lying and thought she was still alive; so he hit her "once or twice" in the head with the edge of the shovel. He then buried the girls with loose dirt. In his statement Sechrest admitted that he performed an act of masturbation on Maggie's body, but, according to him, at this time the girl was already dead.[1]

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[1] At trial a forensic pathologist testified that it was unlikely that Carly fell and killed herself. He also testified that the skull fractures in both children were probably caused by the shovel. He further testified that due to the decomposition of the bodies it would have been impossible to tell if a sexual assault had occurred.

[***4] A jury convicted Sechrest of two counts of first degree murder and two counts of first degree kidnapping. At the penalty phase, the jury set the penalty at death on each murder conviction. In addition the trial judge sentenced Sechrest to life without possibility of parole on each of the two kidnapping counts.

[**629] *Constitutional Issues*

Sechrest contends that the statement he made to the police, wherein he confessed to the killing, was erroneously admitted into evidence by the trial court in violation of his constitutional rights. We reject this contention

Pursuant to the investigation of a grand larceny, Sechrest was approached on June 14, 1983 by officers from the Sparks Police Department. Advising Sechrest of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), Detective Wright asked him if he wanted to talk about the grand larceny charge. Sechrest replied that he wanted an attorney. Officers asked no further questions but took Sechrest to the Sparks Police Department for booking. While waiting to be booked, Sechrest turned to Detective Wright and Sergeant Gonyo and said: "I like you two guys, I don't want an attorney, I will talk to you." [***5] The officers proceeded with the booking and afterward Sechrest was given a standard rights waiver form, which he read and signed in the presence of the officers. During questioning Sechrest stated that the Reno Police were investigating him as a possible suspect in a homicide. Sparks Police did not question Sechrest regarding the homicide but, rather, told him

that they were only interested in the grand larceny charge.

After the interview was finished, Sergeant Gonyo left the room and then returned to inform Sechrest that Officer Bogison of the Reno Police Department was outside. Sergeant Gonyo asked Sechrest if he would like to talk to Officer Bogison, and Sechrest replied: "Yes, I like Mr. Bogison, he is the only one on my side, [*364] and understands me."[2] Officer Bogison then approached Sechrest and said: "I understand you want to talk to me, is that right?" Sechrest replied: "Yes." Sechrest said that he had spoken with his attorney and had been advised to keep his mouth shut. In response, Bogison said: "Well, there is nothing we can do to alter that, . . . do you want to talk to me?" Sechrest replied: "I will tell you what, I will make a deal -- no, I won't make a [***6] deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won't." Bogison then said: "Does this mean you want to talk to us?" Sechrest replied: "Yes."

After the foregoing conversation Officer Bogison, Detective Eubanks and Sechrest entered an interrogation room. Sechrest requested that he be permitted to call his grandmother and also his

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[2] Earlier that evening Detective Eubanks of the Reno Police Department had been contacted by Sechrest's friend, Danny Sportsman. Sportsman told Eubanks that Sechrest wanted to talk to Bogison. Bogison then contacted Mrs. Weaver, Sechrest's grandmother, at her home in a effort to contact Sechrest. Eubanks and Bogison then went to the Sparks Police Department where Sechrest was being questioned in regard to the unrelated grand larceny charge.

attorney. After Sechrest spoke with his grandmother, Officer Bogison asked him: "Do you want to talk to your attorney?" Sechrest replied: "No, I want to get this off my chest." He then made the statement [***7] in which he confessed to the murders.[3]

Generally, a request by the accused for an attorney is itself an invocation of fifth amendment rights, and police must immediately cease questioning, as the officers correctly did after arresting Sechrest on June 14. *Neuschafer v. State*, 101 Nev. 331, [***8] 705 P.2d 609 (1985); *Edwards v. Arizona*, 451 U.S. 477 (1981). However, during the booking procedure, Sechrest initiated a conversation [**630] with the officers in which he unequivocally eschewed his right to an attorney and agreed to be questioned. The United States Supreme Court has stated that "an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges,* [*365] *or conversations with the police.*" 451 U.S. at 484. (Emphasis added.) It is clear that Sechrest reinstituted

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[3] The statement of June 14 had been preceded by other conversations between Sechrest and the Reno Police Department. Officer Bogison had spoken with him regarding the homicides as early as June 8. Officer Bogison and Detective Eubanks had also spoken to him the day before, June 13. In Sechrest's statement of June 13, he did not incriminate himself but, rather, maintained an alibi. The June 13 statement was made in response to a request for "background information," and Sechrest was not under arrest or in custody at the time. Near the end of this interview Sechrest stated that he wished to consult an attorney. Officers ceased questioning at this point and told Sechrest to feel free to "reinstitute contact" with them.

a dialogue with the officers at the booking desk, and therefore, that dialogue falls under the *Edwards* rule.

Although Sechrest initiated the communication, we still must consider whether the waiver was knowingly and intelligently made. 451 U.S. at 486 n. 9. After initiating the exchange, Sechrest read and signed a standard waiver form in the presence of the officers. The trial court found the waiver to have been voluntarily made. Considering Sechrest's background, level of comprehension, and [***9] dialogue with the authorities, it convincingly appears that the waiver was knowingly and intelligently made and therefore voluntary. There is nothing in the record which would cause us to disturb that determination, and we decline to do so.

After Sechrest agreed to talk to the officers, Sergeant Gonyo of the Sparks Police Department informed Sechrest that Officer Bogison of the Reno Police Department was outside. Sergeant Gonyo asked Sechrest if he would like to speak to Officer Bogison. Sechrest gave an unequivocal, affirmative answer. Officer Bogison then entered the room and asked Sechrest if he wished to speak with him. Again, Sechrest replied affirmatively. Clearly, Sechrest not only initiated the meeting with Officer Bogison, he repeatedly affirmed his desire to speak with Bogison upon Bogison's arrival at the Sparks Police Department. After this Sechrest made what is, at best, an ambiguous request for counsel. Sechrest said that he had spoken with his attorney and had been advised to "keep his mouth shut." Even an equivocal request for counsel by an accused requires that "law enforcement officials must cease the interrogation unless they ask the suspect further questions [***10]

to clarify whether the suspect wants to consult with an attorney before continuing with the interrogation." *United States v. Cherry*, 733 F.2d 1124, 1130 (5th Cir. 1984) (citing *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir. 1979 (en banc)).

Officer Bogison's response to Sechrest's comment was in the form of a request to clarify. As demonstrated by the above-quoted colloquy between Sechrest and Bogison, Sechrest invited the officers to question him. In a further attempt to clarify Sechrest's intent, Officer Bogison then inquired: "Does this mean you want to talk to us?" Sechrest replied, "Yes." This was adequate clarification of Sechrest's unimpaired willingness to talk to officers in the absence of counsel.

Recently, the United States Supreme Court in *Smith v. Illinois*, __ U.S. __, 105 S.Ct. 490 (1985), addressed a case which [*366] presented similar facts. The accused in that case was advised by the police that he had a right to consult with an attorney and to have that attorney present during questioning. The accused responded: "Uh, yeah. I'd like to do that." 105 S.Ct. at 491. Subsequently, in response to further interrogation, the accused agreed to speak with police [***11] without consulting an attorney. In reversing the conviction, the Supreme Court stated: "We hold only that, under the clear logical force of settled precedent, an accused's *post-request* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." 105 S.Ct. at 495.

The present case is distinguishable from the *Smith* case because Sechrest did not make such an unambiguous request for an attorney so that Officer

Bogison's attempts at clarification were improper. After Sechrest and the officers entered the interrogation room, Sechrest requested [**631] that he be allowed to telephone his grandmother and also his attorney. After Sechrest spoke to his grandmother, Officer Bogison asked if he then wished to talk to his attorney. Sechrest replied: "No. I want to get this off my chest." Officer Bogison's question followed Sechrest's telephone conversation with Sechrest's grandmother and was a reasonable attempt to clarify whether Sechrest then still wished to telephone his attorney. Sechrest's answer to the inquiry was clear. Sechrest wanted to get the matter "off his chest." Under these circumstances it cannot [***12] be said that officers proceeded with the interrogation in violation of Sechrest's fifth and sixth amendment rights.

Sechrest additionally maintains that at some point during the previous exchanges officers should have once again informed him of his Miranda rights. This argument fails to take into consideration the factual circumstances surrounding Sechrest's statement. Several times prior to making the statement Sechrest was asked if he desired an attorney. He repeatedly rejected the opportunity to have one present during questioning. The record makes it clear that Sechrest not only knew and understood his right to counsel but that he also knowingly and intelligently waived that right. *Taylor v. State*, 96 Nev. 385, 609 P.2d 1238 (1980).

We conclude that admission of the confession by the trial court for use as substantive evidence of guilt was not error.

Even without the confession there is sufficient evidence of Sechrest's guilt to support his conviction. Tanya Wagner, the friend with whom Maggie and Carly skated that day, identified [*367] Sechrest in court as the man who picked up Maggie and Carly at Meadowood. Sechrest knew the victims and was familiar with Logomarsino [***13] Canyon. Police found a bloodstained shovel at Sechrest's residence which a forensic pathologist testified was consistent with the victims' skull fractures. Additionally, fibers found at the gravesites were consistent with fibers taken from Sechrest's car.

Right to Additional Counsel

Sechrest next argues that it was an abuse of discretion for the trial court to deny his request for an additional attorney to represent him. We conclude otherwise.

On June 30, 1983, defense counsel filed a motion for appointment of another attorney to assist him in Sechrest's defense. The reasons given for requesting additional counsel were: complexity of the issues, severity of penalty, and other special circumstances. The court denied the motion. Counsel asked leave to renew the motion for appointment of additional counsel at a later date. However, the motion was never renewed. Trial was set for September 12, 1983, and proceeded without further defense objection.

NRS 260.060[4] authorizes the appointment of additional counsel. However, the permissive language of the statute indicates that such appointment is discretionary with the trial court. Sechrest cites two California cases for [***14] the proposition that in appropriate circumstances a defendant in a capital case should have a second court-appointed attorney. In *People v. Jackson*, 681 P.2d 149 (Cal. 1980), the California Supreme Court held that the defendant in a death penalty case had failed to furnish any specific compelling reasons for the appointment of additional counsel. Noting that neither the facts nor legal issues were so complex as to require additional counsel as a matter of law, the court concluded that the trial court acted within its discretion in denying the defendant's motion to appoint additional counsel. In *Keenan v. Superior Court*, 640 P.2d 108 (Cal. 1983), the California Supreme Court held that denial of the motion for additional counsel was an [**632] abuse of discretion on the facts of that case but emphasized that the decision was still a discretionary one. The facts of *Keenan* are distinguishable from the instant case. In *Keenan* the defense stated it would be necessary to interview approximately 120 witnesses to prepare a meritorious defense. Investigation had to be done with regard to other crimes with which the defendant was charged. Defense counsel also argued [*368] [***15] that he would make numerous pre-trial motions, and despite his objection, a trial date was set seven weeks thereafter.

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[4] NRS 260.060: For cause, the magistrate or district court *may*, on its own motion or upon the motion of the public defender or the indigent person, appoint and compensate out of county funds an attorney *other than, or in addition to*, the public defender. . . . (Emphasis added).

In the instant case there were few pre-trial motions, including the request for an additional attorney. The defense theory was that Sechrest had indeed killed the girls and raised as a defense only the absence of deliberation and premeditation. This theory eliminated the need for much of the investigatory work that would normally have to be done. The state ultimately called only twenty-one witnesses, and the trial only lasted one and one-half weeks. Additionally, defense counsel was able to employ the services of a student legal research assistant.

We conclude that although a capital case represents a complex [***16] form of litigation, these facts make it clear that an undue degree of preparation and investigation was not required, nor was an unreasonable burden placed on Sechrest's counsel. Indeed, as previously noted, defense counsel never sought to renew the motion for additional counsel. Under the facts of this case we find no abuse of discretion.

Prosecutorial Misconduct

Sechrest finally raises an issue of prosecutorial misconduct. He cites as prejudicial error several remarks the prosecutor made to the jury concerning an instruction which informed the jury of the power of the State Board of Pardons Commissioners to modify any sentence the jury imposed.[5] We have carefully examined the statements and the context in which

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[5] Sechrest also argues that the giving of the instruction itself was error. We have previously decided this issue. *See Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

they were made. We conclude that they do not either individually or cumulatively rise to the level of prejudicial error warranting reversal.

[***17] *Proportionality*

We have reviewed our other cases in which the sentence of death has been imposed to determine whether Sechrest's sentence is disproportionate. Our review leads us to conclude that the sentence of death is not disproportionate in this case when considered in light of the nature of the murders and the lack of mitigating factors which might possibly militate against the sentence of death.

We also conclude from the record that the sentences of death were not imposed under the influence of passion, prejudice or any arbitrary factor. NRS 177.055(2)(c).

[*369] We have carefully examined the remaining contentions of error and conclude that they are without merit. In sum, Sechrest was fairly tried, convicted and sentenced. The judgment of the trial court is, in all respects, affirmed.

APPENDIX E

108 Nev. 158; 826 P.2d 564; 1992 Nev. LEXIS 32

Supreme Court of Nevada

No. 21827

[Filed February 20, 1992]

RICKY DAVID SECHREST, Appellant,	)
v.	)
THE STATE OF NEVADA, Respondent	)

[***1] Appeal from a denial of post-conviction relief from two sentences of death. Second Judicial District Court, Washoe County; Charles M. McGee, Judge

COUNSEL: *Robert Bruce Lindsay*, Reno, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; *Dorothy Nash Holmes*, District Attorney; and *Gary H. Hatlestad*, Deputy District Attorney, Washoe County, for Respondent.

JUDGES: Mowbray, C.J., Springer, J., Rose, J., Steffen, J., Young, J.

OPINION

[*159] [**565] Ricky David Sechrest was convicted of the brutal 1983 slayings of two young girls and sentenced to death. We affirmed Sechrest's judgment of conviction and sentences in *Sechrest v. State*, 101 Nev. 360, 705 P.2d 626 (1985). Sechrest now seeks to overturn his death sentences through post-conviction relief by asserting that he received ineffective assistance of counsel at the penalty phase of his trial. The district court determined that Sechrest's counsel had indeed performed deficiently, but denied relief because Sechrest had failed to show any prejudice resulting from his counsel's [***2] performance. After careful consideration, we affirm the decision of the district court.

Background

The primary witness for the State at the penalty phase of Sechrest's trial was Lynn M. Gerow, a psychiatrist. Gerow had originally been appointed as an expert by the court at the request of defense counsel. Gerow had examined Sechrest and submitted a report of his findings to defense counsel. The defense decided [*160] not to call Gerow as a witness in the penalty phase, but acquiesced to the State's request to call Gerow. Among other things, Gerow's testimony indicated that Sechrest was an incurable sociopath, who had an extensive history of criminal activity and drug use.

In a hearing before the district court, Sechrest sought to establish that he was denied his sixth amendment right to effective counsel because of his attorney's failure to prevent Gerow from testifying for

the State. The district court determined that defense counsel's performance was substandard in that he failed to interview Gerow before the penalty phase in order to evaluate the possibly damaging effect of Gerow's testimony (defense counsel did communicate with Gerow several times before the State indicated its desire [***3] to use Gerow as a witness). Despite its determination that defense counsel's representation was deficient, the district court denied relief because Sechrest had failed to demonstrate that he had been prejudiced by his attorney's performance. This appeal followed.

Discussion

Sechrest contends that the district court erred by requiring him to show that he was prejudiced by his counsel's derelictions. Sechrest nevertheless concedes that sixth amendment ineffective assistance of counsel claims are generally governed by the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by this court in *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984). Under *Strickland* standards, a defendant raising a claim of ineffective assistance of counsel must establish that counsel's performance was deficient, [**566] *and* that the deficiency prejudiced the defense. 466 U.S. at 687. However, Sechrest contends that his claim warrants a fifth amendment analysis because defense counsel facilitated the violation of Sechrest's fifth amendment right against self-incrimination by permitting Gerow to testify about his psychiatric [***4] examination of Sechrest. A fifth amendment analysis would shift the burden to the State to prove beyond a reasonable doubt that any constitutional errors were harmless.

Satterwhite v. Texas, 486 U.S. 249 (1988); *Chapman v. California*, 386 U.S. 18 (1967).

A state risks violating fifth amendment rights by seeking to enhance its prospects for a death verdict through the introduction of statements made by the defendant during the course of a court ordered psychiatric examination. *Estelle v. Smith*, 451 U.S. 454 (1981). When such statements are wrongfully used, the state is [*161] required to prove beyond a reasonable doubt that the error was harmless. *Satterwhite; Chapman*.

In the instant case, however, the defendant's statements were not improperly obtained or used. Dr. Gerow's psychiatric examination of Sechrest was ordered *at the request of the defense*. The State later sought and obtained permission to use Gerow's testimony during the penalty hearing. In contrast, *Satterwhite* and *Estelle* involved situations where defense counsel was not the moving force behind the psychiatric examination that was introduced over the objection of [***5] counsel. Additionally, the trial courts in *Satterwhite* and *Estelle* were required by Texas law to impose the death penalty if the jury answered certain questions affirmatively, including the question of whether the defendant posed a continuing threat to society. The psychiatric testimony in those cases addressed the latter question, and thus impacted a crucial issue. In contrast here, although Gerow opined that Sechrest would not change, Nevada has not designated future dangerousness as an aggravating circumstance upon which the death penalty may be considered. NRS 200.033.

Gerow's testimony did not implicate any of the aggravating circumstances which were found by the jury as a basis for the imposition of the death penalty. Sechrest's statements were properly communicated to Gerow, and introduced with the consent of defense counsel. Neither federal nor state law supports an assertion that Sechrest's fifth amendment rights were violated. Thus, the issue is one of ineffective assistance of counsel to which the *Strickland* test applies.

As noted above, the *Strickland* standard involves a two pronged inquiry: was defense counsel's performance deficient, and, if so, was the [***6] defendant prejudiced as a result. We need not determine whether the district court was correct in finding counsel's performance deficient because Sechrest has clearly failed to show prejudice. *See Strickland*, 466 U.S. at 697; *Bejarano v. State*, 106 Nev. 840, 801 P.2d 1388 (1990).

"When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland* at 695. *See also Howard v. State*, 106 Nev. 713, 800 P.2d 175 (1990).

[*162] In the penalty phase, the jury found four aggravating circumstances for each murder. Specifically, the jury found that the murders were

committed: (1) during the course of a kidnapping;[1] (2) during the commission or attempted commission of sexual assault; (3) for the purpose of avoiding or preventing a lawful arrest; and (4) in a manner involving torture, depravity of mind or the mutilation of the victim. No [**567] mitigating [***7] circumstances were found. Gerow's testimony regarding Sechrest's criminal history and dim prospects for change was unrelated to any of the above aggravating factors. Therefore, Sechrest can only show prejudice by establishing that Gerow's testimony negated mitigating circumstances that would have been sufficiently strong to overcome the aggravating circumstances.

The only mitigating factor argued by the defense which may have been affected by Gerow's testimony concerned the jurors' failure to find that Sechrest lacked a significant history of prior criminal activity. NRS 200.035(1). Dr. Gerow testified that Sechrest had admitted to an extensive history of criminal involvement. However, other witnesses also testified about Sechrest's prior involvement with the law. During closing argument, defense counsel recounted Sechrest's previous crimes,[2] but emphasized Sechrest's lack of previous involvement [***8] in crimes of violence. Thus, the jury heard testimony other than Gerow's from which to reject this mitigating factor. In any event, even if Gerow's testimony were viewed as having the potential to dissuade the jurors from

---

[1] The jury had already found Sechrest guilty of two counts of first-degree kidnapping in connection with the murders.

[2] These included burglary, possession of stolen property, possession of controlled substances and curfew violation.

finding this one mitigating factor, it is clear beyond a reasonable doubt that no error occurred that would have caused the jury to conclude that the four aggravating circumstances were outweighed by the arguably mitigating factor no matter how strongly it may have been established.

The evidence at trial exposed the heinous nature of Sechrest's brutal crimes. Nothing short of the most compelling mitigating circumstances would have offered the potential of a sentence other than death. None were shown to exist. Although Gerow's testimony was not flattering to Sechrest, it revealed little that the jurors would not have surmised from the brutality and lack of humanity associated with Sechrest's [***9] destruction of two innocent young lives. As the district court observed, Gerow's testimony was little more than cumulative. We agree, and are unable to conclude or remotely perceive that absent Gerow's testimony, there is a reasonable probability that the result would have been different.

[*163] Accordingly, we conclude that Sechrest was not denied the effective assistance of counsel during the penalty stage of his trial, and affirm as being fully justified the district court's denial of post-conviction relief from Sechrest's sentences of death.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-99004
D.C. No. CV-N-92-0536-ECR
District of Nevada, Reno

[Filed April 14, 2009]

RICKY DAVID SECHREST,	)
	)
Petitioner - Appellant,	)
	)
v.	)
	)
JOHN IGNACIO,	)
	)
Respondent - Appellee.	)
	)

ORDER

Before: PREGERSON, W. FLETCHER and BERZON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX G

28 U.S.C. § 2254 (pre AEDPA)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to the protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of

a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other available and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in such an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstance. respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of the paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If

the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot produce such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

APPENDIX H

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

Case No. C83-1014
Dept. No. 2

[Filed January 14, 1991]

RICKY DAVID SECHREST,	)
	)
Petitioner,	)
	)
vs.	)
	)
THE STATE OF NEVADA,	)
	)
Respondent.	)
	)

This matter came on regularly for hearing on Thursday, November 8, 1990. Petitioner was present in Court and represented by Robert Bruce Lindsay, Esq. The Respondent, State of Nevada, was represented by Gary Hatlestad, Esq., Deputy District Attorney.

At the end of the hearing, counsel were placed on a briefing schedule, which is now complete. In addition to those points and authorities, the Court has

examined the other pleadings, papers, and transcripts and deems itself fully advised in the premises.

The grounds for relief urged by the Petitioner in support of his petition for post conviction relief are unusually narrow:

> "Simply stated, it is Petitioner's contention that the conduct of Donald Aimar at the penalty phase fell below the acceptable standard of competency for a criminal defense attorney in a death penalty case. Specifically, Don Aimar allowed the testimony of Dr. Gerow at the request of Mills Lane, the district attorney in the case, without first talking to Dr. Gerow regarding his prospective testimony and thereafter, Don Aimar failed to properly object to the use made of that testimony by Mills Lane in cross-examination of various witnesses and in the final arguments made to the death penalty panel of jurors." [Petitioner's Opening Brief, page 1, line 23-28; page 2, line 1-5].

At the initial behest of Mr. Aimar, Dr. Gerow examined Mr. Sechrest in August of 1983. During the penalty hearing in September, however, it was the District Attorney who called Dr. Gerow. Mr. Aimar posed no objection (Transcript page 4, line 30).

The following testimony elicited by then District Attorney Hills Lane from Dr. Gerow illustrates the kind of evidence the Petitioner feels was unduly prejudicial:

> "A . Well, basically we are talking about a young man who had an unstable family background,

who got into trouble with the law early in his life, dropped out of school and had a series of detentions in various facilities in Illinois and California. Basically he has been unsocialized most of his life.

Q. [By Mills Lane] Doctor, let me ask you this: Can you tell the jury what you believe his regard for human life is?

A. I only have the same basis that the jury has, you know, for drawing that conclusion. Of course, my interview with him. I would say he has a callous disregard for human life. (Transcript page 6, lines 7-17]."

And a few moments later:

"Q. Would you say, Dr. Gerow, from what we know happened, and from your examination of Mr. Sechrest, that at least insofar as young children are concerned, little girls, that this man could be considered dangerous?

A. Well, yes, I would. (Transcript, page 7, lines 15-19)."

Mr. Aimar was not able to rehabilitate this testimony, and in fact may have reinforced it. The following colloquy between Mr. Aimar and Dr. Gerow appears on page 11 (lines 16-29) of the Transcript:

"Q. Does he have any evidence of any mental disorder?

A. Yes.

Q. Such as?

A. Antisocial personality, commonly referred to as sociopathic personality.

Q. By an antisocial personality, what would bring that about? What factors cause that?

A. Of course no one knows for sure, but the theory is that it comes about as the result of deprivation in childhood, particularly very serious deprevation in the first year of life.

Q. Deprivation of what?

A. Deprivation of usually the mother, but in some cases some other caretaker who is responsible for the child."

And, again on page 13 (lines 17-19) of the Transcript:

"Q. Did you say that he had a callous disregard for life? You used the words earlier that that was your opinion.

A. Yeah, that is my conclusion. He did not say that."

Perhaps the strongest statement of all comes in response to a further query by Mr. Aimar about the degree of Mr. Sechrest's "callousness":

"A. What I think Mr. Lane was trying to establish, certainly in my mind it is clear we are discussing someone who has an antisocial or

> sociopathic personality. Now that is fixed. That is not going to change. You know that has been going on for years and to the extent that that is already in place, it is going to be there 10 years from now or 20 years from now. So if the intent of your question is is he going to change over the next several decades, the answer is no, he is not going to change." (Transcript page 18, lines 7-15).

At the hearing on the petition for post-conviction relief, the petitioner offered testimony from several lawyers. They shared an opinion that since Dr. Gerow was originally a defense expert, Mr. Aimar could have thwarted Mr. Lane from putting Dr. Gerow on the stand and eliciting adverse opinion testimony -- and that to have performed competently, Mr. Aimar should have made this effort.

For example, attorney Dennis Widdis felt unequivocally that Dr. Gerow's testimony could have been excluded on the basis of a doctor-patient privilege, and that allowing the testimony was in his word "inexcusable", and that the impact was "weighty". Attorney Robert Witek noted the absence of any mid quid pro quo or other consideration to Petitioner arising from Mr. Aimar's stipulation allowing Dr. Gerow to testify.

There is a fair argument that Mr. Aimar's failure to object constitutes a bonafide tactical decision as urged by Deputy District Attorney Hatlestadt in his Brief in Opposition (see page 6). Mr. Aimar didn't have too much to work with in Mr. Sechrest's case and he could have legitimately felt that on balance, Dr. Gerow's

testimony would be compatible with that of Deborah Payton, Dennis Tupper and Reverend Ted Allen.

The Court, however, tends to agree with the defense witnesses, particularly Mr. Widdis, that Mr. Aimar should have fully interviewed Dr. Gerow first and he should have calculated more precisely whether the potential risks of the physician's testimony outweighed the potential gain from his testifying. Plainly, the "balance" of Dr. Gerow's testimony does not favor Mr. Sechrest. It favors the State.

For this reason, the Court finds that in this narrow circumstance, the level of Mr. Aimar's professional effort fell below that which the standards expect from an attorney in a capital case.

Finding an instance of substandard performance, however, does not end the inquiry. A second circumstance must appear from the record before the Petitioner is entitled to any relief; and that is manifest prejudice. As stated in the most recent case examining the issue, the ". . .defendant must show that the deficient performance prejudiced the defense", Bejarno v. State, ___ Nev. ___, decided December 7, 1990, case no. 20466.

In this connection, the Court's task is guided by the Nevada Supreme Court's recent decision in Samuel Howard v. State of Nevada, Nevada Adv. Opn. 20368, filed November 7, 1990. There, quoting extensively from the U.S. Supreme Court case of Strickland v. Washington, 466 U.S. 668 at p. 687 (1984), the Court must be satisfied that the errors are so serious that they "deprive the defendant of a fair trial". Further, the Court states that "...the standard which should be

used to determine whether prejudice occurred during the penalty phase of a capital case is:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Strickland, 466 U.S. at 695.

Had the Sechrest jury been deciding between life with parole possibilities vs. life without, or life in prison vs. a term of years, the Court would not have much hesitation in concluding that the exclusion of Dr. Gerow's opinion testimony regarding Sechrest's sociopathic tendencies might have had a pronounced effect on the outcome.

This jury, however, had to decide between death and life in prison, period. Dr. Gerow's testimony concerning the irremediable and fixed nature of the deficits in the defendant's character has to be examined with the question in mind whether it would have made a difference. In other words, would reasonable persons have concluded to spare his life if they had not learned that from a psychiatrist's viewpoint, there was not much hope for Sechrest's reform?

Nothing at all about Dr. Gerow's testimony can add much to the conclusion that the jury could reach by

other evidence: that they were called upon to sentence a person who had manifested the signs of an utterly unfeeling and uncaring person.

Whether a person is called a sociopath by a psychiatrist or a person of "black and malignant heart", (somewhat archaic terms used commonly several years ago by the legal system), the conclusion, whether reached in lay or professional terms, is pretty much the same.

Insight into the state of mind and morality which has been described by words such as "callous" and "sociopathic" in this case, does not belong exclusively to the realm of mental health professionals.

There are some eerie similarities between Ricky Sechrest and one Albert Everett Sala who was convicted of first degree murder forty-five years ago. Sala beat a man named McCollum to death with a hammer and a wrench, inflicting the fatal blows long after the victim posed any threat to his assailant.

Writing for the Supreme Court of Nevada Justice Horsey observed in his opinion affirming the death penalty:

> "Sala's own description of those beatings, together with the known facts and circumstances, reveal his real character as a robber-killer. Here is a man wounded and almost helpless, trying to reach his automobile, probably his only hope of being able to go some place for medical attention, and is cruelly stricken down after having been beaten time after time with the wrench. While the primary

> motive was robbery, the wanton, cruel severity of the beatings, of a man in McCollum's condition, discloses craven cowardice, and the intent to kill McCollum to prevent his reporting this and the previous crime, and, probably, the blood thirst and lust of the killer." State v. Sala, 63 Nev. 270 at p. 295, 169 P.2d 524 at p. 536 (1946).

Is Ricky Sechrest any less of a "craven coward" than was Albert Sala?

Further on in the same opinion, Justice Horsey makes another telling observation about Sala.

> "The circumstances and the severity of both these series of beatings each with a deadly weapon reasonably calculated to produce death, and their repetition to the extent that there were three basal fractures of the skull, reasonably lead to the conclusion that there was malice, both express and implied. Sala deliberately intended unlawfully to take away the life of McCollum, and such intent is manifested by external circumstances capable of proof.
>
> The robber-killer, of the type Sala has shown himself to be, will kill an individual deliberately, and without provocation, when, as in the perpetration of robbery, he conceives it to be to his interest to do so. Sometimes it is due to physical cowardice, to avoid possible physical injury to himself, and sometimes due to moral cowardice, to avoid detection and the just punishment which he realizes he deserves." *Id.* at page 303 (539 in P.2d).

When he pounded his young victims to death, Ricky Sechrest displayed the same quality of moral cowardice, the same cowardly desire to escape detection as did Albert Sala. This Court believes that it is a valid rhetorical question to ask: "Was Dr. Gerow telling the Sechrest jury anything it did not already know?"

The character of Ricky Sechrest is illuminated as much, if not more, by his conduct than by someone's opinion of him, no matter how erudite and credentialed the examiner. Had Mr. Aimaer failed to present or had he shielded from the jury's view evidence of an expert opinion showing a side of Sechrest inconsistent with the type of moral constitution his conduct suggests, such an oversight would have great implication. As it is, however, the evidence was not much more than cumulative.

In point of fact, there is an argument that the evidence in question may even have had a slightly mitigating effect. If a person who is possessed with a full compliment of decision-making moral guidelines, a complete conscience if you will, nonetheless decides to subject two little girls to a nightmare ending in their bludgeoning -- isn't that crime a little bit more heinous than the same conduct perpetrated by a man who was shortchanged early in life, who thinks only of himself?

Obviously, the Court cannot say whether the jury found any mitigating aspects to Dr. Gerow's testimony. Certainly, the testimony under scrutiny does not paint any softer picture of Ricky Sechrest. It is clearly descriptive of a negative side of his character, and should be looked at no other way for the purposes of his post-conviction petition.

Nonetheless, viewed from an objective standpoint, the evidence does not seem to be enough to have "tipped the balance". Dr. Gerow's testimony can instead be viewed in simply another way of describing the side of Sechrest which was already before the jury in the starkest fashion possible. In terms of its potential inflammatory effect it may be likened to smouldering ember; the jury had already been exposed to the fire itself. Dr. Gerow's testimony could not have unduly inflamed this panel of jurors; it could have helped to explain the inflammation which was already there to be seen.

The case discussed at length by Mr. Sechrest's counsel in his final brief, Winiarz v. State, 104 Nev. 43, 752 P.2d 761 (1988), is distinguishable. There are some similarities, such as the State's subsequent use of a psychiatrist expert, Dr. Master, who had been engaged not by the State but instead by defense counsel, to evaluate the Defendant. But Dr. Master in Winiarz was permitted to testify that the Defendant was lying when she claimed the homicide was accidental; clearly the psychiatrist was invading the province of the jury.

Our case does not involve the credibility of Mr. Sechrest on issues of guilt; what it instead involves is his character and personality for purposes of meriting capital punishment. In that sense, anyway, Winiarz is inapposite.

Mr. Lindsay further argues that the jury was exposed through Dr. Gerow's testimony to a record of previous criminal history by Sechrest, that the jury unnecessarily learned of charges of burglary,

possession of stolen property, and narcotics in Illinois, Kentucky and Nevada (see pp. 5 and 6 of the Penalty Hearing transcript and the further reference in closing argument at p. 114).

Once again, the point in a different context could be very well taken. Had the criminal history unnecessarily brought to light included an assault, or some other crime of violence, it would be impossible to say whether that evidence might have tipped the scales in favor of a decision to have Mr. Sechrest executed. But can it be reasonably argued that a passing reference to a couple of property crimes and a victimless narcotics charge persuaded this jury to go with the death penalty? Hardly.

Perhaps this very kind of evidence could be used to support the proposition that Sechrest was more dangerous than a person without this past kind of record, but Sechrest's dangerousness to future homeowners or possessors of property is certainly taken care of almost as much by a life in prison without parole as it could have been by imposing the death penalty.

This Court does not feel that it can be reasonably maintained that the Sechrest jury was focusing upon some remote possibility of future harm to society because of the commission of property offense or a drug crime; they were focusing upon the immediate impact upon society of the heartless bludgeoning of two little girls.

There are capital cases which seem borderline because of the confused mental state of the Defendant or perhaps the degree of provocation from the victim or

victims. There are capital cases which seem borderline because of the motive of the Defendant or because of some mitigating aspect about his or her character. In a given case, evidence of profound remorse might play a role.

Nothing like these circumstances are present in the case of Ricky Sechrest. This Court does not feel this case is borderline, or that Ricky Sechrest was deprived of a fair hearing.

The petition may be, and HEREBY IS, DISMISSED.

DATED THIS 14th day of January, 1991.

/s/
DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-N-92-536-ECR
(Death Penalty Case)

[Filed May 20, 1999]

RICKY DAVID SECHREST,)
Petitioner,)
)
v.)
)
JOHN IGNACIO, et al.,)
Respondents.)
)

THIRD AMENDED PETITION
FOR WRIT OF HABEAS CORPUS
EXHAUSTED CLAIMS ONLY

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I. INTRODUCTION

In accordance with the decision of the United States Court of Appeals for the Ninth Circuit, filed on August 27, 1998, this Third Amended Petition for Writ of Habeas Corpus has been amended to eliminate all claims which have been adjudicated as procedurally barred. The Third Amended Petition now sets forth ***five claims of error*** for this Court's review. These five claims of error have been deemed exhausted by the Nevada Supreme Court and the United States Court of Appeals for the Ninth Circuit. This Honorable Court has been ordered by the Ninth Circuit Court of Appeals to ***"permit petitioner to delete the claims which are procedurally barred, and then proceed to determine the merits of the five exhausted claims."*** (Order of Ninth Circuit Court of Appeals, August 27, 1998, p. 3).

For this Court's convenience and to avoid any citation errors, this counsel has cited to the record below in two ways: (1) Counsel has cited to the name and date of the transcript, along with the page and/or line; and (2) Counsel has cited to Respondents' Exhibits which were originally filed with this Court on September 1, 1993.

* * *

Ricky David Sechrest stands before this court convicted in September of 1983 of two counts of murder in the first degree and two counts of kidnaping in the first degree. Ricky David Sechrest was sentenced to death and two consecutive life terms for the murders and kidnaping of Carla Villa and Maggie Schindler.

On June 19, 1983, Ricky David Sechrest confessed to these killings. Once Ricky David Sechrest's motion to suppress was denied, the guilt phase of the trial was no longer in question This became a "penalty phase" trial in which the death penalty became the only issue before the jury.

At first glance, one might assume that the convictions were well founded and the death penalty justly imposed. Upon a closer reading of the record, however, it becomes apparent that Ricky David Sechrest was provided ineffective assistance of counsel at the pre-trial, trial and penalty phase. Further, there was little or no evidence offered at the trial to support the kidnappings and virtually no evidence offered to support the four aggravating circumstances as found by the jury.

Evidence that was neither relevant nor probative was persistently introduced and argued at trial to inflame and prejudice the jury against Mr. Sechrest. This was a high profile case which dominated the Reno media for nearly three months prior to trial. The arguments of the prosecutor, Mills Lane, revealed that prosecutorial misconduct occurred from voir dire through the penalty phase. Further, Mr. Lane introduced psychiatric testimony at the penalty phase, which the State knew to be in direct contravention of the then existing law, pursuant to Estelle v. Smith, 451 U.S. 454 (1981).

The record revealed that not only was Mr. Sechrest denied counsel, but that defense counsel's tactics during trial were instrumental in assuring the subsequent imposition of the death penalty.

All the claims of error which arose from the proceedings against Mr. Sechrest have now been whittled down to five. Still, these five are sufficient and egregious enough on their own to compel this Honorable Court to conclude that Mr. Sechrest was not afforded due process of law under the United States Constitution pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments.

The prosecutorial misconduct of Mills Lane in delivering his inflammatory comments to the jury undoubtedly altered the outcome of the jury's verdict. More specifically, Lane's comments as to the possibility of executive clemency and his urging of the jury to put to death this "mad dog"— as more fully set forth below – undoubtedly unfairly influenced the jury's decision regarding the death penalty.

The trial court's failure to appoint a second attorney in Sechrest's defense on such a high profile death penalty case surely violated Sechrest's Sixth Amendment rights. As evidence to support this fact, one need not look any further than the recently amended Nevada Supreme Court Rule 250, which holds attorneys working on death penalty cases to enhanced standards of expertise, and now requires two death-penalty qualified attorneys to represent any criminal defendant in a capital murder case.

Ricky David Sechrest's Fifth Amendment rights were violated by the admission of his statements to police into evidence at trial. The provisions of the Fifth Amendment and the supplemental protections afforded by *Miranda* are cornerstones of the rights guaranteed to criminal defendants in our legal system. The disregard of these rights in Sechrest's case are

perfectly illustrative of the lengths to which the State went to convict Sechrest and to condemn him to death.

It is well established law in this country that the testimony of Dr. Gerow, Sechrest's own psychiatrist -- without valid permission from Sechrest -- violates the Fifth Amendment. Estelle v. Smith, *supra*. As violative as the Courts have determined *Miranda* violations to be in our legal system, This Fifth Amendment violation is more egregious than the Miranda violation, for obvious reasons. For it is not a police officer soliciting information from the defendant, but a doctor, a mental health professional, whom the defendant has been led to trust with confidential information.

Finally, there is no good reason in the record for the conduct of Don Aimar, Sechrest's trial counsel, in failing to prevent Dr. Gerow's testimony or for failure to prepare for it. Aimar's conduct was inexcusably ineffective, as determined by the Honorable Charles M. McGee on November 8, 1990. Further, given the entire record and the circumstances, there can be no question that Airmar's ineffectiveness — especially as to the Dr. Gerow issue — prejudiced Sechrest and led to his conviction and punishment of death.

A. *STANDARD OF REVIEW*.

By far the most important issue for this Court's review is the matter of the standard of review which was erroneously employed by the Nevada Supreme Court in reviewing the findings of the district court regarding the ineffective assistance of counsel with respect to the testimony of Dr. Gerow.

The Honorable Charles McGee erroneously applied the Strickland v. Washington, *infra,* standard to his analysis of the prejudice which attached to trial counsel's ineffective representation of Sechrest. The Nevada Supreme Court affirmed Judge McGee's application of Strickland to these facts. The Nevada Supreme Court erroneously reasoned that the difference between Estelle v. Smith and its progeny, and the case at bar was that Sechrest's trial attorney didn't object to Gerow's (the psychiatrist's) testimony. Sechrest v. State, 108 Nev. 158, 161, 826 P.2d 564 (1992). Both the district court and the Nevada Supreme Court ignored the reality that trial counsel's failure to object was the basis upon which he was found to be IAC. That finding of IAC is the factor that crystalizes this issue: If trial counsel's failure to object was found to be IAC, how can that same failure thereafter be used to apply a lower standard of review to Sechrest's Estelle v. Smith claim regarding the damaging impact of the Gerow testimony and the obvious U.S. Constitutional Fifth Amendment violation.

These five claims of error, alone or together, mandate that this Honorable Court grant Ricky David Sechrest's Third Amended Petition for Writ of Habeas Corpus and that his death sentence be overturned or commuted to life without the possibility of parole.

II. FACTUAL AND PROCEDURAL SUMMARY

A. Trial, September 12-19, 26, 1983.

Ricky David Sechrest was convicted September 19, 1983, by a jury in the Second Judicial District Court of two counts of Murder in the First Degree and two

counts of Kidnaping in the First Degree. On September 27, 1983, the jury set the penalty as death for both murder convictions. On October 28, 1983, the Honorable John W. Barrett entered judgment consistent with the jury's verdicts and sentenced Mr. Sechrest to life in prison without the possibility of parole on each of the kidnaping convictions.

B. Direct Appeal & Decision of Nevada Supreme Court filed August 27, 1985.

Mr. Sechrest appealed the judgment of conviction and the imposition of the death penalty to the Supreme Court of the State of Nevada. Notice of Appeal was filed November 28, 1983. That appeal was denied August 27, 1985, in case number 15320.

C. Filing of Post-Conviction Petition & Subsequent Procedures.

Ricky David Sechrest filed a petition for post-conviction relief on November 13, 1985; the supplement to that petition was filed January 13, 1986; and finally, response to the petition was filed February 24, 1986. The hearing on the petition for post-conviction relief was held on November 8, 1990 in front of the Honorable Charles M. McGee. Written arguments were filed thereafter and a decision rendered January 14, 1991. Appeal was filed therefrom with the Supreme Court of the State of Nevada on January 25, 1991. Written arguments were filed by counsel for appellant, Robert Bruce Lindsay, Esq., and opposition was filed by Gary Hattestad, counsel for the District Attorney's Office of Washoe County. Oral arguments were heard and thereafter a decision was rendered on February 20, 1992, Case No. 21827,

Sechrest v. State, Nevada Supreme Court. A Habeas Corpus Petition was filed thereafter with this Court. That Petition was denied by this Court on July 27, 1996. Subsequently, a writ of habeas corpus was filed in State District Court and this Court's decision was appealed to the United States District Court for the Ninth Circuit. The end result of each of these two actions were the same. The Nevada Supreme Court declared that there were five issues which were exhausted and ripe for review by this Court. The Ninth Circuit Court of Appeals named the exact same five issues and Ordered this Court to review the same. These five issues are listed below and are the only claims of error which are asserted herein for this Court's review.

D) November 8, 1990 Post-Conviction

On November 8, 1990, a post-conviction hearing was held before the Honorable Charles M. McGee. At that hearing, Mr. Lindsay, on behalf of Mr. Sechrest, called five witnesses to the stand: Mills Lane, Donald Aimar, Fred Atcheson, Dennis Widdis, and Robert Witek. This Petition will briefly highlight the testimony of the witnesses.

Mr. Sechrest contended that the performance of Donald Aimar during the pre-trial and trial was below the acceptable standards of a trial attorney and that the record was replete with errors of constitutional magnitude. Mr. Sechrest further contended that the **conduct of Donald Aimar at the penalty phase fell below the acceptable standard of competency for a criminal defense attorney in a death penalty case.** Specifically, Donald Aimar allowed Dr. Gerow to testify at the penalty hearing at

the request of Mills Lane, the prosecuting attorney in the case. Donald Aimar allowed the testimony without first talking to Dr. Gerow regarding his prospective testimony. Thereafter, Donald Aimar failed to properly object to the use made of that testimony by Mills Lane in cross-examination of various witnesses and in the final arguments made to the death penalty panel of jurors. The Penalty Hearing Transcript of Testimony, September 26, 1983, reflected not only the damaging nature of the Dr. Gerow testimony, but the failure of Donald Aimar to previously discuss the penultimate question of the death penalty with at least two other witnesses Mr. Aimar called, Dennis L. Tupper and the Reverend Ted Allen. The damaging nature of Dr. Gerow's testimony was unquestionably present. The lack of preparation by Donald Aimar was patently obvious from the September 26, 1983, transcript. Ricky David Sechrest was denied effective assistance of counsel pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments. The decision of the Honorable Charles M. McGee reflected the finding that Donald Aimar was inadequate. That IAC finding is still binding upon this Court.

E) The Prejudicial Testimony of Dr. Gerow.

At the Penalty Phase, without having testified at trial, Dr. Gerow described the alleged prior felonious conduct of Ricky David Sechrest, in response to leading questions posed by Mills Lane. Thereafter Dr. Gerow concluded that Ricky David Sechrest was a sociopath with a "callous disregard for human life." (Penalty Hearing Transcript of Testimony, September 26, 1983, page 6, lines 16-17; Respondents' Exhibit 45). On cross-examination Donald Aimar brought out further damaging testimony by drawing out

considerable testimony from Dr. Gerow regarding the fixed nature of the antisocial, sociopathic personality, which would not be subject to change regardless of the passage of time. (Penalty Hearing Transcript of Testimony, September 26, 1983, page 18, lines 7-15; Respondents' Exhibit 45). (See also Redirect, page 23, lines 24-25, for the conclusion; Respondents' Exhibit 45). At page 24 of the Transcript of Testimony, Mr. Aimar establishes beyond any shadow of a doubt that Ricky David Sechrest could never reform his behavior, that counseling would be "absolutely fruitless," and as Mr. Aimar concluded, it was "hopeless."

The effect of this testimony is obvious to any criminal defense lawyer who has been in a death penalty phase hearing. It is difficult to imagine a more damaging scenario. This testimony of Dr. Gerow was a prosecutor's dream and a defense attorney's worst nightmare. The evidence at the post-conviction hearing was undisputed in regard to Mr. Aimar's ability to prevent any of this testimony from coming before the jury based upon one or all of the several privileges available to Donald Aimar. **Privileges Donald Aimar simply stipulated away; the doctor-patient privilege, the *attorney-client privilege*, the *work-product privilege*, and the *Fifth Amendment right* to not have the statements Ricky David Sechrest made to Dr. Gerow used against him without the proper Miranda warnings and waiver.** It should be further remembered that Dr. Gerow was an expert hired by Donald Aimar, and as such, his opinion and his report were confidential, only available to the prosecutor by way of waiver.

The principle question for this Honorable Court then is: What then is the effect of failing to object

when the failure to object is the very basis for a finding of IAC. There can only be two answers: either (1) the objection factor cannot be considered; or (2) the failure to object must be used as a basis for the lower (Fifth Amendment) standard (as in Estelle v. Smith, *supra*).

The actions of Donald Aimar at the penalty phase amount to a clear violation of Ricky David Sechrest's right to adequate assistance of counsel as guaranteed by the Sixth Amendment, his Fifth Amendment Miranda rights and due process pursuant to the Eighth and Fourteenth Amendments.

The testimony of Fred Atcheson, Dennis Widdis, and Robert Witek was that Donald Aimar's performance was unquestionably deficient (as found by Charles M. McGee's decision) and further that the deficiency undoubtedly prejudiced Mr. Sechrest's right to a fair penalty hearing. (See section V, below). The expert testimony of Mr. Atcheson, Mr. Widdis and Mr. Witek remains uncontroverted to date.

F. Decision of the Nevada Supreme Court, February 20, 1992

The Nevada Supreme Court adopted the findings of Judge McGee without considering the prosecutorial misconduct of Mr. Lane, or the various other infirmities patently revealed by the cursory reading of the record. The Nevada Supreme Court also failed to review the evidentiary basis for the aggravating circumstances as required by statute.

G. Decision of the Nevada Supreme Court, November 20, 1997.

Although the Order of the Nevada Supreme Court is not binding upon this Honorable Court, it is relevant for Exhaustion purposes. On page 3, footnote 2 of the Order filed November 20, 1997, the Nevada Supreme Court sets out the following ***five*** claims as being previously exhausted:

> **(1) whether the prosecutor committed misconduct by commenting on a jury instruction regarding the Pardons Board, see Sechrest v. State, 101 Nev. 360, 368, 705 P.2d 626, 632 (1985); (2) whether it was an abuse of discretion to deny Sechrest's request for additional counsel, see id. at 367-68, 705 P.2d at 631-32: (3) whether Sechrest's confession was properly admitted, see id. at 363-67, 705 P.2d at 629-31; (4) whether the testimony of Dr. Lynn Gerow, Sechrest's psychiatrist, violated Sechrest's Fifth Amendment right not to incriminate himself, see Sechrest v. State, 108 Nev. 158, 160-61, 826 P.2d 564, 565-66 (1992); and (5) whether trial counsel provided ineffective assistance for failure to investigate and interview Dr. Gerow, see id. at 161-63, 826 P.2d at 566-67.**

H. Order of the United States Court of Appeals for the Ninth Circuit, August 27, 1998.

Sechrest appealed this Honorable Court's decision of July 27, 1996 to the United States Court of Appeals

for the Ninth Circuit. The Ninth Circuit recognized the five issues which were exhausted:

> **(1) denial of a fair trial due to prosecutorial misconduct regarding comments on executive clemency, Sechrest v. State, 705 P.2d 626, 632 (1985);**
>
> **(2) violation of Sixth Amendment right to effective assistance of counsel due to failure of trial court to appoint Sechrest a second attorney, id. at 631-32;**
>
> **(3) violation of Fifth Amendment right against self-incrimination by admission into evidence of petitioner's statements to police, id. at 629-31;**
>
> **(4) violation of Fifth Amendment right against self-incrimination by admission into evidence of Dr. Gerow's testimony, Sechrest v. State, 826 P.2d 564, 565-66 (1992);**
>
> **(5) violation of Sixth Amendment right to effective assistance of counsel for trial counsel's failure to prevent or prepare for Dr. Gerow's testimony, id. at 566-67.**

The Ninth Circuit dismissed the appeal and remanded the case back to this Honorable Court with the following instructions: "The district court should vacate its order dismissing the petition, permit the petitioner to delete the claims which are procedureally barred, and then proceed to determine the merits of the five exhausted claims." *See* page 3, last paragraph,

of the Order of the United States Court of Appeals for the Ninth Circuit, August 27, 1998.

I. Order of the United States District Court, April 23, 1999.

According to the Order of April 23, 1999, this Honorable Court has granted Mr. Sechrest an extension in which to file this Third Amended Petition until May 20, 1999. This Third Amended Petition therefore follows, and is timely.

III. CLAIMS FOR RELIEF

For this Court's convenience and for the sake of uniformity, all claims for relief are entitled exactly as they were worded by the Ninth Circuit Court of Appeals in its Order of August 27, 1998, in which the Ninth Circuit determined which issues were exhausted and ripe for this Court's review.

1. "DENIAL OF A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT REGARDING COMMENTS ON EXECUTIVE CLEMENCY," IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner was denied a fair trial because of the Court's failure to *sua sponte* object to the State's inflammatory and improper comments regarding possible executive clemency if the jury were to hand down anything except the death penalty. The Court also failed to admonish the jury to disregard the State's arguments regarding possible executive clemency. Therefore, it cannot be determined with any

certainty that the inflammatory comments did not unfairly influence the jury's decision to hand down the death penalty.

A district court judge has the duty under the Sixth Amendment to ensure that every accused receives a fair trial. The prosecutor in the instant case improperly commented and argued to the jury that if a sentence of life in prison without the possibility of parole was imposed, there was no guarantee that the jury's verdict would be properly executed, the prosecutor was allowed by the trial court to argue that the only way to keep the community safe was to kill the Petitioner.

The prosecutor's remarks regarding clemency were several. They started during jury selection when Mills Lane asked one prospective juror the following:

> **The judge is going to give you an instruction at the penalty phase, if we get there, that he will impose the penalty that you say, but if you say life in prison without parole, that doesn't mean that the pardons board can't let him out. Now, would you consider that when you arrive at your verdict?**

(Trial Transcript (TT), September 12, 1983, p. 170; Respondents' Exhibit 41).

Then the prosecutor asked another prospective juror:

> **His Honor, will give you a charge, a jury instruction saying if you impose life**

without parole that really doesn't mean life forever. If he gives you that charge, will you take that into consideration in deciding that the verdict ought to be?

Both jurors answered affirmatively.

(TT, September 12, 1983, p. 226; Respondents' Exhibit 41).

At the penalty hearing, during closing argument, the prosecutor again commented on the possibility of executive clemency:

Now, the judge has told you that if you return a verdict, whatever verdict you return, he will impose. He also told you, and it is very important under the laws of this state, the State of Nevada, any sentence imposed by the jury may be refused by the State Board of Pardon commissioners. Whatever sentence you return in your verdict this Court will impose that sentence. Whether or not the State Board of Pardon commissioners, upon review, if requested by the Defendant, would change that sentence, the Court has no way of knowing. Indeed, you don't either. The State Board of Pardon commissioners, however, would have the power to modify any sentence at a later date. . .his defense. It was a fraud. And let's say you fall for that fraud and you say well, gee, I just can't bring myself to do what I should do, and I am going to impose life without parole. You don't die in

> **prison of old age. People get out. Now, are you prepared to risk the life of some other person or child by giving him the opportunity to get out? That will be your risk. That will be your burden.**

(Penalty Phase Transcript (PPT), September 26, 1983, p. 102; Respondents' Exhibit 45).

Mills Lane later told the jury,

> **If you return a verdict of life without the possibility of parole, I represent to you as a lawyer, as an attorney for the people of this county, that the pardons board has the authority to commute that tomorrow if they want to. They won't, of course, but they have the authority to. So don't buy that he is going to go to jail forever. It just doesn't happen.**

(PPT, September 26, 1983, p. 129; Respondents' Exhibit 45).

The prosecutors comments and argument were improper and were unfairly prejudicial. Although the prosecutor filled the trial and penalty phase with improper and inflammatory comments, these were especially damaging. There is no doubt that the jury was left with the impression that as the "conscience of the community," they had no choice but to kill the "mad dog" if they were to perform their civic duty. (PPT, September 26, 1983, p. 114-115; Respondents' Exhibit 45). This error was prejudicial and resulted in the death sentence being imposed upon Mr. Sechrest.

The Court instructed the jury in instruction No. 15 on the issue as follows:

> **If the penalty is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served.**
>
> **If the penalty is fixed at life imprisonment without the possibility of parole, the Defendant shall not be eligible for parole. Under the laws of the State of Nevada, any sentence imposed by the jury may he reviewed by the State Board of Pardon Commissioners. Whatever sentence you return in your verdict, this Court will impose that sentence. Whether or not the State Board of Pardon Commissioners upon review, if requested by the Defendant, would change that sentence, this Court has no way of knowing. The State Board of Pardon Commissioners, however, would have the power to modify any sentence at a later date.**

However, the prosecutor far exceeded the scope of the instruction in his arguments and used the instruction in a manner not contemplated by the Court or the relevant case law. *See* Collier v. State, 705 P.2d 1126 (1985).

The Nevada Supreme Court in Petrocelli v. State, infra, concluded that, because of the magnitude of the decision regarding the sentencing in a capital case, the instruction must contain a provision that instructs the jury that they may not consider the possibility of

executive clemency, but must assume their verdict will be carried out:

> **We therefore conclude, given the magnitude of the cases involved and the need to avoid prospective reversals resulting from unacceptable versions of this type of instruction, that hereafter (unless and until the law on the subject is modified), in all trials commenced after the publication of this opinion, and when requested by either the state or the defendant, the following instruction, and none other, may be given:**
>
> **1. Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the Defendant would be eligible for parole after a period of ten years. This does not mean that he would be paroled after ten years, but only that he would be eligible after that period of time.**
> **2. Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole.**
> **3. If you sentence the Defendant to death you must assume that the sentence will be carried out.**
> **4. *Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed***

> ***that you may not speculate as to whether the sentence you impose may be changed at a later date.***

Petrocelli v. State, 101 Nev. 46, 57; 692 P.2d 503, 511 (1985) (emphasis added). *See also* NRS 175.161(7); Sonner v. State, 112 Nev. 1328, 1334, 930 P.2d 707, 711-12 (1996); Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir.), *cert. denied*, 512 U.S. 1220, 114 S.Ct. 2706 (1994); and Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996), *reh'g granted on other grounds*, 114 Nev. 100, 952 P.2d 431 (1998).

The improper comments of Mills Lane – along with Instruction No. 15 on clemency in this case -- may well have mislead the jury into believing that it could eliminate any possibility of commutation of a sentence by imposing the death sentence. The prosecutor's argument, coupled with the instruction, infers that a life sentence without possibility of parole may be commuted, but fails to inform the jury that a death sentence may also be pardoned. The instruction and the prosecutor's comments thus erroneously suggested to the jury that a death sentence will assure the defendant's permanent removal from society whereas the alternative sentence will not. *See* People v. Haskett, 30 Cal.3d 841, 861, 180 Cal.Rptr. 640, 653, 640 P.2d 776, 789 (1982).

Presented with this choice, it cannot be said that the jury did not impose the death sentence to prevent the Pardons Board from commuting a life sentence without possibility of parole. *See* Gardner v. Florida, 430 U.S. 349, 359, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977) ("we must assume that in some cases [the instruction] will be decisive"). The Constitution simply

does not permit a State to "stac[k] the deck" against a capital defendant in this manner. Witherspoon v. Illinois, 391 U.S. 510, 523, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968). *See* Adams v. Texas, 448 U.S. 38, 43-44, 100 S.Ct. 2521, 2525-2526, 65 L.Ed.2d 581 (1980).

The comments and instruction oversimplified the process of clemency. McClain v. Calderon, 134 F.3d 1383, 1385 (1998). The jury was not informed that the State Board of Pardons Commissioners at the time consisted of the Governor, Justices of the Nevada Supreme Court, and the Attorney General. NRS 213.010 (version at the time). The jury was not informed that any person intending to apply to have the punishment commuted or a pardon granted must give notice not only to the Board, but to the District Attorney and the district court of the county where the conviction was handed down, as well as the warden of the Nevada State Prison. The District Attorney as well as the Warden of the Nevada State Prison may argue against any commutation or pardon and submit their own recommendations. Testimony may also be given as to the merits of either position. Moreover, any prison who has once applied and been denied favorable action on his request may not apply a second time to the Board absent "substantial change in circumstances." The second application must be previously approved by the Secretary of the Pardons Board.

Further, when a death penalty case is being considered, the presence of the governor is required and any judgments must be made by the majority of the Board. Rules of the Board, Rule 9. There are further rules regarding statements as to the character

of the prisoner and the sentence to which the death penalty may be commuted. Rule 10. No application may be considered until the prison has done at least ten years. Rule 15. The instruction and the comments failed to mention or explain any of these or any other requirements of the process. Thus, like the failure to mention the fact that a death penalty can also be commuted or pardoned, the failure to explain this process resulted in a fraud being perpetuated on the jury, and the Sixth Amendment rights of Mr. Sechrest being violated.

A. *PROOF OF EXHAUSTION*

1. Ricky David Sechrest was denied a fair trial because of the Court's failure to sua sponte object to the prosecutor's inflammatory and improper comments regarding possible executive clemency after the imposition of sentence.

EXHAUSTION: Sechrest v. State, 101 Nev. at 368, 705 P.2d 626, 632:

> "We have carefully examined the statements and the context in which they were made. We conclude that they do not either individually or cumulatively rise to the level of prejudicial error warranting reversal."

Id. See also Petition For Post-Conviction Relief, January 13, 1986 at para. XIV (see excerpt at section 4, above); Supplement to Petition for Post-Conviction Relief, January 13, 1986 at pp. 27-32, 34-35 (see excerpt at section 4, above).

The Ninth Circuit Court of Appeals recognized this claim of error to be exhausted in the case of Sechrest v. State, 705 P.2d 626, 632 (1985), at page 2 of its August 27, 1998 Order.

2. "VIOLATION OF SIXTH AMENDMENT [OF THE U.S. CONSTITUTION RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE OF TRIAL COURT TO APPOINT SECHREST A SECOND ATTORNEY."

The trial court's denial of defense counsel's request to appoint a second attorney to assist in Petitioner's defense was an abuse of discretion and denied Petitioner effective assistance of counsel and a fair trial under the Sixth Amendment to the United States Constitution.

On June 30, 1983, the State filed its notice of intent to seek the death penalty in the instant case. Petitioner was arraigned on July 1, 1983 before Judge Guinan. At that hearing, Don Aimar was appointed to represent Petitioner. A jury trial was duly set to commence September 12, 1983, a scant nine weeks after Petitioner entered his pleas of Not Guilty to the crimes charged.

The State's charging document listed fifty-eight potential State's witnesses. On July 20, 1983, the Court granted the State's motion to endorse an additional twenty-one witnesses. On August 19, 1983, an additional witness was endorsed. In total, the State endorsed eighty witnesses.

From the outset it was apparent to defense counsel that Petitioner's case would pose a significant challenge. Not only would defense counsel need to interview the numerous State witnesses but he would need to interview his own witnesses for both the guilt and penalty phases of the trial, formulate a defense strategy and prepare and argue the various motions that a capital case demands. Mr. Aimar's motion requesting that the court appoint Dave Houston as second counsel was based on his Affidavit. In it, he avers that the case involved complex issues, severity of penalty and other special circumstances requiring another appointed attorney. Mr. Aimar's Affidavit, attached to the motion, indicating that he believed that the case would pose great difficulty should have been given great deference by the Court. Instead, his well reasoned request was denied and his client convicted and sentenced to death. He was ultimately found ineffective by Judge McGee after a hearing on Sechrest's post-conviction petition charging ineffective assistance of counsel.

The Rules of the Nevada Supreme Court (Rule 250) concerning procedure and requirements of counsel in death penalty cases was recently amended to require two death-penalty qualified attorneys to represent every defendant charged with capital murder. The Rule also added enhanced qualifications just to make the list of trial lawyers who are death-penalty qualified The requirements include increased Continuing Legal Education credits earned within 18 months of the case.

The historic recognition of the need for two attorneys to represent any criminal defendant charged with capital murder goes back to our nation's

beginning. Our nation's First Congress required the assignment of up to two attorneys to a capital defendant at the same time it initiated capital punishment. Mallard v. United States District Court, 490 U.S. 296, 109 S.Ct 1814, 104 L.Ed2d 318 (1989) (interpreting Act of July 20, 1892, ch. 209, S 1 , 27 Stat. 252, now codified at 28 U.S.C. S 1915(d)).

A. *PROOF OF EXHAUSTION*

1. The Trial Court's denial of defense counsel's request to appoint a second attorney to assist in Ricky David Sechrest's defense was an abuse of discretion and denied Mr. Sechrest effective assistance of counsel and a fair trial.

EXHAUSTION: Sechrest v. State, 101 Nev. at 360, 367-368:

> "We conclude that although a capital case represents a complex form of litigation...an unreasonable burden [was not] placed on Sechrest's counsel...defense counsel never sought to renew the motion for additional counsel. Under the facts of this case we find no abuse of discretion."

Id. at 368. See also Petition For Post-Conviction Relief, January 13, 1986 at para. III:

> "Although not expressly so, the request for another attorney implicitly raises the issue of whether trial counsel provided the Defendant reasonable effective assistance...(Emphasis added)"

Id. (quoting Deputy District Attorney, ILLYSSA L. FOGEL, in Respondent's Answering Brief, at page 28, lines 14-21). See also para. XI:

> "...the STATE prosecuted RICKY DAVID SECHREST with two attorneys, MILLS LANE and KEN HOWARD; that from the record it appears that the defense's Motion for Assistance of Counsel may well have prevented the ineffective record which is now before this Court ..."

Id. See also, Supplement to Petition for Post-Conviction Relief, January 13, 1986:

> "TRIAL COURT'S REFUSAL TO APPOINT A SECOND ATTORNEY WAS AN ABUSE OF DISCRETION AND DENIED MR. SECHREST A FAIR TRIAL."

Id. at pp. 34 (quoting the issues raised on direct appeal).

The Ninth Circuit Court of Appeals recognized this claim of error to be exhausted in the case of Sechrest v. State, 705 P.2d 626, 631-32 (1985), at page 3 of its August 27, 1998 Order.

3. "VIOLATION OF FIFTH AMENDMENT [OF THE U.S. CONSTITUTION] RIGHT AGAINST SELF-INCRIMINATION BY ADMISSION INTO EVIDENCE OF PETITIONER'S STATEMENTS TO POLICE."

A. Ricky David Sechrest's statements to law enforcement officers.

Petitioner's Constitutional right to a fair trial was defeated by the trial court's denial of his well based Motion to Suppress. Prior to June 13, 1983, Petitioner had been interviewed several times with regard to the disappearance and deaths of the two victims by Detectives Bogison and Eubanks.

On June 13, 1983, Petitioner responded to the Reno Police Department to again be interviewed with respect to that matter. Petitioner provided hair samples for testing and submitted to a polygraph examination. Petitioner responded that he desired to speak to his attorney before cooperating as to either request but continued to answer questions on numerous matters. Finally, in exasperation, Petitioner exclaimed, **"I'm confused. I still would like to talk to a lawyer. I just think it would be best to talk to him because this is getting a little too serious for me to handle here. When it comes down to me and what I've done and what I haven't done, you know, whatever."**

And, there was no doubt that these officers were informed not only that Petitioner wished to speak to an attorney but that ***he was in fact represented by counsel.***

On June 14, 1983, Petitioner was arrested by the Sparks Police Department to answer to felony charges of grand larceny and embezzlement. These charges were unrelated to the disappearance and deaths of Maggie Schindler and Carly Villa. Petitioner initially refused to answer any of the police's questions and asked for his attorney. But, during the booking process he apparently changed his mind and agreed to answer questions regarding the grand larceny and embezzlement charges. He then signed a waiver of his Miranda rights with regard to the two property offenses and discussed that case with Detective Wright and Sergeant Gonyo. Although Mr. Sechrest proceeded to answer the detectives' questions in that regard, he refused to make a written statement. After Sergeant Gonyo terminated the interrogation he told Petitioner that Detective Bogison of the Reno Police Department was outside and asked him if he wanted to talk to him.

Although Petitioner told Wright during their discussions regarding the theft offenses that the was under investigation in a homicide case, he made no statements to him or Gonyo in that regard. In fact, Detective Wright assured him that he was not investigating a homicide and was only interested in the grand larceny report that he was investigating. Nonetheless, as soon as Petitioner completed his statement, Detective Wright asked Petitioner if he would also care to talk to Detective Bogison, who was coincidentally right outside the interview room. The detective knew that Bogison and Eubanks were investigating the homicide case. When Petitioner assented, Bogison and Eubanks fetched him and took him down the hall to another interview room.

Petitioner was never given Miranda warnings by Detectives Bogison or Detective Eubanks. Vol II, p.23, lines 28-30, p. 24, lines 1-5. Detective Bogison's statement that Petitioner was not under arrest was deceptive. Under the circumstances of their contact with Petitioner at the Sparks Police Department, the detectives knew that Petitioner had been arrested for theft offenses. Detective Bogison admitted as such during the hearing on Petitioner's Motion to Suppress.

On June 14, 1983, the detectives knew that Mr. Sechrest was represented by an attorney, Mr. Aimar. And, despite the fact that Detective Bogison testified at the Motion to Suppress that Petitioner was not in custody, he knew that Petitioner was in custody for the theft offenses. It is clear that once in the clutches of Bogison and Eubanks, Mr. Sechrest asked to speak to his grandmother and his lawyer. He apparently changed his mind about speaking to his lawyer after he spoke with his grandmother. But, the fact remains he was in custody, he was not in Mirandized with respect to the homicide and although the detectives knew that he was represented by counsel, they approached him to try to illicit an incriminating statement.

Although the law allows for a waiver of Miranda when a suspect initiates contact with a member of law enforcement, that is simply not the case here. Petitioner had told the detectives on June 13, 1983 that he wished to speak to an attorney. He invoked his rights at that time and the detectives terminated their questioning. Petitioner's very timely arrest the very next day for the theft offenses the detectives hovering outside the interview room where Petitioner was being questioned regarding those offenses was clearly

prearranged. The homicide detective's use of Detective Wright to approach Petitioner to again try to convince him to talk to them was a clever ruse to circumvent the clear meaning of the *Miranda* holding and its progeny.

In order to be voluntary, a confession must be the product of a 'rational intellect and a free will. Passama v. State, 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987). The determination of what constitutes a "rational intellect and a free will" must be determined under the "totality of the circumstances" test.

The first level of analysis then, the *voluntariness* of Sechrest's statements to the police, must be shown under the *totality of the circumstances* test. Mincey v. Arizona, 437 US. 385, 401, 98 S.Ct. 2408 (1978). However, this applies only to the basic *due process analysis* of voluntariness of confessions in general. There is a *second* analysis that must be performed: the *knowing and intelligent* test. The totality of the circumstances may be relevant to a discussion of whether a defendant's confession is voluntary under due process standards. See Mincey v. Arizona, 437 U.S. 385, 401, 98 S.Ct. 2408 (1978); Davis v. North Carolina, 384 U.S. 737, 741-742, 86 S.Ct 1761 (1966). *The 'totality of the circumstances' test, however, is not applicable in analyzing whether a defendant has relinquished his Fifth amendment rights against self-incrimination. See* Edwards v. Arizona, 451 U.S. 477, 483, 101 S.Ct 1880 (1981). Instead, ***in that the purported waiver of a constitutional right is ineffective unless knowingly and intelligently made, the alleged waiver of Miranda rights must be judged under a "knowing and intelligent waiver" standard.*** *See* Miranda v. Arizona, 384 U.S.

436, 475, 88 S.Ct 1602 (1966). ***The application of this higher standard of review may result in the exclusion of some confessions which might have been voluntary under the lesser 'totality of the circumstances' test.*** *See* Michigan v. Mosely, 423 U.S. 96, 114 S.Ct. 321 (1975) (Brennan, J. Dissenting).

When this two-tiered level of analysis is employed, the conclusion can only be that Ricky David Sechrest's Fifth and Fourteenth Amendment rights were violated by the State.

B. PROOF OF EXHAUSTION

1. Miranda rights: Ricky David Sechrest's statements to law officers.

EXHAUSTION: Sechrest v. State, 101 Nev. at 360, 363-67:

> "Sechrest contends that the statement he made to the police, wherein he confessed to the killing, was erroneously admitted into evidence by the trial court in violation of his constitutional rights We reject this contention."

Id. at 363. See also, (Direct) Appeal of the Post-Conviction Petition and Appellant's Opening Brief, May 21, 1984 at p. 15-22:

> "THE DEFENDANT'S STATEMENTS TO THE POLICE WERE ERRONEOUSLY ADMITTED IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS."

Id. at 15, also:

> "The trial court failed to indicate what standard it applied in determining whether Mr. Sechrest's statements were voluntary."

Id. at 19; Supplement to Petition for Post-Conviction Relief, January 13, 1986 at pp. 35 (preservation of allegation quoted above, from p. 15 of Appellant's Direct Appeal).

The Ninth Circuit Court of Appeals recognized this claim of error to be exhausted in the case of Sechrest v. State, 705 P.2d 626, 629-31, at page 3 of its August 27, 1998 Order.

4. "VIOLATION OF FIFTH AMENDMENT [OF THE U.S. CONSTITUTION] RIGHT AGAINST SELF-INCRIMINATION BY ADMISSION INTO EVIDENCE OF DR. GEROW'S TESTIMONY.

Dr. Gerow's testimony for the State at the penalty phase of trial deprived Sechrest of his rights against self-incrimination and a fair trial in violation of the Fifth and Fourteenth Amendments.

The United States Supreme Court decided Estelle v. Smith, 101 S.Ct 1866 in 1981, two years prior to the Sechrest trial. The holdings of Estelle clearly put Mr. Aimar, counsel for Ricky David Sechrest, Mr. Lane, counsel for the State and his Honor, Judge Barrett, on notice that psychiatric testimony, such as that elicited by Mr. Lane when he called Dr. Gerow at the penalty phase, was objectionable beyond question. Lack of remorse, alleged prior criminal conduct, the prognosis for future dangerousness; all revealed during the course of a psychiatric exam, had already been

recognized as a 5th Amendment violation by the U.S. Supreme Court. As in Estelle, Sechrest was examined to determine competency to stand trial; but the results of the examination were used in a much broader context, not only by the elicited testimony before the jury, but in the closing argument of Mr. Lane as further explored in this Petition.

A. Dr. Gerow responded to the questioning of Mr. Lane by defining Mr. Sechrest as a sociopath.

Under the brilliant cross-examination of Mr. Aimar, further testimony was elicited, such as, Mr. Sechrest's chances of rehabilitation being absolutely "fruitless" and "hopeless." This Court is referred to the entire text of the Penalty Phase, in order to understand the magnitude of error generated by the State's opening of this testimony in direct violation of the then existing law pursuant to Estelle v. Smith. See also the Amicus Curiae Brief filed by the American Psychiatric Association.

There is no good reason nor tactical advantage of having Mr. Aimar's client labeled a "sociopath." The prejudice is apparent, as Mr. Lane argued at the penalty phase, "a sociopath can't learn. What's the good of sending him to jail?"

B. Unreliable and unsubstantiated testimony regarding Ricky David Sechrest's prior criminal conduct.

The State has been unable to produce any evidence to support the alleged prior criminal conduct which was introduced by Dr. Gerow. Use of unsupported and

unreliable prior criminal conduct before a death penalty jury is an independent basis for reversal of Mr. Sechrest's death sentence.

C. "Future Dangerousness" established for life by the age of one; Amicus Curie in Estelle v. Smith (unreliable medical conclusion and statement of Doris Presser).

The Amicus Curie brief establishes the unreliable nature of Dr. Gerow's future dangerousness findings. Doris Presser, Ricky David Sechrest's natural mother, gave a statement regarding Ricky's childhood which directly contradicts the testimony of Dr. Gerow. Dr. Gerow believed that Ricky David Sechrest had been neglected as a child and that his sociopathic personality was fixed by the age of one. Dr. Gerow, of course, had never bothered to interview any of the Sechrest family or in anyway investigated the social history of Mr. Sechrest. His conclusions are based upon a single jailhouse meeting with Mr. Sechrest which lasted some 43 minutes.

D. *PROOF OF EXHAUSTION*

In response to Respondent's first argument, Petitioner submits the following grounds of error and subsequently, the proof of exhaustion of each:

1. The testir ony of Dr. Gerow at the penalty phase of the trial deprived Sechrest of his 5th Amendment right of protection from self-incrimination and his 14th Amendment right to a fair trial. (Estelle v. Smith, 101 S.Ct. 1866 (1981).)

EXHAUSTION: Sechrest v. State, 108 Nev. 158, 160-161, 826 P.2d 564. The court states:

> "Sechrest contends that his claim warrants **a fifth amendment analysis because defense counsel facilitate the violation of Sechrest's fifth amendment right against self-incrimination by permitting Gerow to testify about his psychiatric examination of Sechrest.**"

Id., 108 Nev. at 160 (emphasis added); See also Petition For Post-Conviction Relief, November 13, 1985, which alleges:

> "Dr. GEROW was called at the penalty phase by the STATE, which may not only show incompetence of counsel, but a violation of RICKY DAVID SECHREST's Fifth Amendment right to not be a witness against himself."

Id. at p.5; Supplement to petition for Post Conviction Relief, January 13, 1986 at pp. 16-25, in which Mr. Sechrest cites Esquivel and McKenna, infra, as authority. The argument, in pertinent part, claims:

> "In light of Esquivel and McKenna, counsel should have objected to Dr. Gerow's testimony."

* * *

"The evidence was objectionable on at least the following grounds:...2) a violation of RICKY DAVID SECHREST's right against self-incrimination; the Fifth Amendment; Esquivel and McKenna;"

* * *

"...this is a clear constitutional error and the state must prove it was harmless beyond a reasonable doubt. (McKenna v. State)"

Id. at pp. 18, 19; Arguments in Support of Post-Conviction Hearing, November 30, 1990 at p.2-4:

"The testimony of Dr. Gerow was a prosecutor's dream and a defense attorney's worst nightmare. The evidence at the post-conviction hearing was undisputed in regard to Mr. Aimar's (defense counsel) ability to prevent any of this testimony from coming before the jury based upon one or all of the several privileges available to Don Aimar."

Id. at p.3; Reply to Post-Conviction Hearing, January 7, 1991 at pp.2-11, generally; Appeal of Post-Conviction Petition And Appellant's Opening Post-Conviction Brief, March 25, 1991 at pp. 3-5, 23-24. With regard to the several privilege's which were violated, Petitioner has alleged:

"the doctor-patient privilege, the attorney client privilege, and the Fifth Amendment right to not have the statements Ricky David Sechrest made

to Dr. Gerow used against him without the proper Miranda warnings and waiver."

Id. at p.4-5.

Specifically, the following sub-issues have been exhausted:

a. Dr. Gerow's testimony defining Mr. Sechrest as a "sociopath" who's chances of rehabilitation were absolutely "fruitless" and "hopeless."

EXHAUSTION: Sechrest v. State, 108 Nev at 160:

"Among other things, Gerow's testimony indicated that Sechrest was an incurable sociopath..."

Id. See also Supplement to Petition for Post-Conviction Relief, January 13, 1986 at pp. 23-25, where it is pointed out by quoting from the penalty phase hearing that this testimony was drawn at the insistence of defense counsel:

"'Q Does he have any evidence of any mental disorder?

"A Yes.

"Q Such as? "Antisocial personality, commonly referred to as sociopathic personality.'"

Id. at p.23; Arguments in Support of Post-Conviction Hearing, November 30, 1990:

> "The damaging nature of Dr. Gerow's testimony is unquestionably present...in response to leading questions... concluded that Ricky David Sechrest was a sociopath with a 'callous disregard for human life.'" (citations omitted)

Id. at p. 2; Reply To Opposition to Post-Conviction Hearing, January 7, 1991 at pp. 3, 7:

> "...the very nature of Dr. Gerow's testimony...that Mr. Sechrest was a sociopath who would never get better... brings a different standard of review to these proceedings."

Id. at p.3; Appeal of Post-Conviction Petition and Appellant's Opening Post-Conviction Brief, March 25, 1991 at pp. 4, 23:

> "Mr. Aimar brought out further damaging testimony by drawing out considerable testimony from Dr. Gerow regarding the fixed nature of the antisocial, sociopathic personality, which would not be subject to change regardless of the passage of time."
>
> * * *
>
> "...Mr. Aimar establishes beyond any shadow of a doubt the Ricky David Sechrest could never reform his behavior, that counseling would be 'absolutely fruitless,' and as Mr. Aimar concluded, it was 'hopeless.'"

Id. at p. 4.

b. Unreliable and unsubstantiated testimony regarding Ricky David Sechrest's prior criminal conduct.

EXHAUSTION: Sechrest v. State, 108 Nev at 162, wherein, in response to Mr. Sechrest's claims of error, the court found that:

> "Gerow's testimony regarding Sechrest's criminal history and dim prospects for change was unrelated to any of the above aggravating factors."
>
> * * *
>
> "Dr. Gerow testified that Sechrest had admitted to an extensive history of criminal involvement."

Id. See also Supplement to Petition for Post-Conviction Relief, January 13, 1986 at pp. 18-19:

> "Without objection counsel has allowed unreliable testimony regarding possible criminal activity, unrelated to that charged, to be introduced to the penalty phase jury."

Id. at 18; Arguments in Support of Post-Conviction Hearing, November 30, 1990:

> "Dr. Gerow described the alleged prior felonious conduct of Ricky David Sechrest, in response to leading questions posed by Mills Lane..."

Id. at p. 2; Reply To Opposition to Post-Conviction Hearing, January 7, 1991 at pp. 3, 7:

> "...the errors exposed by the penalty phase transcript are constitutional in magnitude... Ricky David Sechrest suffered not only from the inadequate performance of Don Aimar, but his Fifth Amendment rights were violated by Dr. Gerow's testimony; the very nature of Dr. Gerow's testimony, claiming Mr. Sechrest had committed prior felonies..."

Id. at 3; See also Appeal of Post-Conviction Petition and Appellant's Opening Post-Conviction Brief, March 25, 1991 at p. 23; Appellant's Reply Brief, July 24, 1991:

> "Mills Lane elicited the prejudicial testimony from Dr. Gerow: the unsubstantiated prior juvenile and adult felonies...This was State action. The State called Dr. Gerow as a witness."

Id. at p.5.

c. "Future Dangerousness" established for life by the age of one; Amicus Curie in Estelle v. Smith (unreliable medical conclusion and statement of Doris Presser).

EXHAUSTION: Sechrest v. State, 108 Nev at 161:

> "...although Gerow opined that Sechrest would not change, Nevada has not designated future dangerousness as an aggravating circumstance upon which the death penalty may be considered."

Id. See also Supplement to Petition for Post-Conviction Relief, January 13, 1986 at pp. 23-27, arguing the unreliability of Dr. Gerow's testimony, by quoting Dr. Gerow in the penalty phase hearing as he explained comments regarding Mr. Sechrest's alleged sociopathic personality:

> "A ... the theory is that it comes about as the result of deprivation in childhood, particularly very serious deprivation in the first year of life."

Id. at p. 23, see also:

> "So if the intent of your question is he going to change over the next several decades, the answer is no, he is not going to change."

Id. at p. 24; Arguments in Support of Post-Conviction Hearing, November 30, 1990 at pp. 2-3:

> "On cross-examination Don Aimar brought out further damaging testimony by drawing out considerable testimony from Dr. Gerow regarding the fixed nature of the antisocial, sociopathic personality, which would not be subject to change regardless of the passage of time."

Id. at p. 2; Reply To Opposition to Post-Conviction Hearing, January 7, 1991 at pp. 8-10:

> "Fred Atcheson, Dennis Widdis, and Robert Witek all testified to the use...of the Gerow testimony and the damaging nature of future dangerousness testimony."

Id. at p. 8; Appeal of Post-Conviction Petition and Appellant's Opening Post-Conviction Brief, March 25, 1991:

> "...Mr. Aimar establishes beyond any shadow of a doubt that Ricky David Sechrest could never reform his behavior..."

Id. at p. 4; Appellant's Reply Brief, July 24, 1991:

> "Mills Lane elicited the prejudicial testimony from Dr. Gerow...Ricky David Sechrest's violent nature, his future dangerousness...like all of the above cited cases, this appeal involves the combination of Fifth and Sixth Amendment violations."

Id. at p. 5.

The Ninth Circuit Court of Appeals recognized this claim of error to be exhausted in the case of Sechrest v. State, 826 P.2d 564, 565-66 (1992), at page 3 of its August 27, 1998 Order.

V. "VIOLATION OF SIXTH AMENDMENT [OF THE U.S. CONSTITUTION] RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL FOR TRIAL COUNSEL'S FAILURE TO PREVENT OR PREPARE FOR DR. GEROW'S TESTIMONY."

At the post-conviction evidentiary hearing, Donald Aimar testified that his own performance fell below the standard of reasonableness. Further, three other defense experts, as well as the former District Attorney on the case, Mills Lane, testified that the

conduct of Aimar — especially at the penalty phase — was deplorable.

A) DONALD AIMAR'S TESTIMONY AT THE NOVEMBER 8, 1990, POST-CONVICTION HEARING.

Donald Aimar, the trial and penalty phase defense attorney for Ricky David Sechrest, testified that Dr-Gerow was hired as an expert and as such his testimony was privileged and confidential. Testimony of Donald Aimar, November 8, 1990, in post-conviction hearing:

(Transcript of Post-Conviction Hearing (PCH), Page 24, Lines 19-24 and Page 25, Line 1; Respondents' Exhibit 95):

> "A I had a motion for the appointment of an expert in which I had Mr. Sechrest examined by a psychiatrist. That was not brought under the section to have a hearing on whether the person was capable of aiding and assisting counsel in a defense or insanity as a defense to the case. It was brought under whatever section it was at the time that related to the appointment of experts."

Donald Aimar's testimony clearly establishes that Dr. Gerow's reports and findings were confidential. Dr. Gerow was an expert retained solely by the defense. Mr. Aimar further testified that he did not know whether or not he had talked with Dr. Gerow prior to allowing him to be used by the prosecution.

(PCH, Page 28, Lines 7-13; Respondents' Exhibit 95):

"Q ... Do you have a specific recollection whether or not after Mr. Lane informed you he was planning on calling Dr. Gerow, whether or not you went and talked with Dr. Gerow?

"A I have no recollection.

"Q You might have, you might not have?

"A I don't remember."

Donald Aimar also admitted that Mr. Lane had made full use of Dr. Gerow's testimony.

(PCH, Page 56, Lines 18-24; Respondents' Exhibit 95):

"Q ...It is apparent from the transcript that testimony of Dr. Gerow is being used by Mr. Lane; is it not?

"A I assume these questions are by Mr. Lane?

"Q Yes, they are. I am sorry. Yes, they are. This if the cross of, I want to say Deborah Payton.

"A It is. It is on the next line. It appears that he was using that testimony, yeah."

Donald Aimar recognized the prejudicial effect of Dr. Gerow's testimony and that the testimony could have been prevented.

(PCH, Page 73, Line 24 and Page 74, Lines 1-12; Respondents' Exhibit 95):

"Q Okay. The confidential statements that he made to Dr. Gerow, would you recognize that he had a right to have that confidentiality maintained?

"A All right. I agree with that.

"Q Did you ever at any point go to Mr. Sechrest and ask him whether or not he wished to waive that confidentiality?

"A I don't recall if we talked about that.

"Q Okay. In light of the Court's ruling, I would like to ask you just a couple of big general questions. Is it fair to say that the testimony of Dr. Gerow was used as a central theme from start to finish in that penalty phase hearing?

"A Well, I think that the answer is that it was used extensively by Mr. Lane."

(PCH, Page 74, Lines 21-24; Respondents' Exhibit (RE) 95):

"Q As an attorney, could that have been avoided had you taken the time to go and specifically discuss his potential testimony prior to the penalty phase?

"A I am not sure. It is possible."

On cross-examination by Gary Hatlestad, Donald Aimar explained that the only reason Dr. Gerow was called was to accommodate the wishes of Mills Lane. It was not a tactical decision and in fact it was nothing

more than Donald Aimar wishing to accommodate opposing counsel.

(PCH, questions by Gary Hatlestad, Page 84, Lines 10-16; Respondents' Exhibit 95):

> "Q What I would like to know then, Mr. Aimar, is what occurred that made you change that position?
>
> "A As I said, Mr. Lane contacted me about using Dr. Gerow for a witness, and after discussing it with Mr. Lane, I felt there might be some value in what Dr. Gerow could present that would work on our penalty phase hearing. So I agreed to allow that."

The Court must remember that the above-cited testimony shows the double ineffectiveness of Mr. Aimar. Mr. Aimar never talked with Dr. Gerow to establish whether or not he could make potential use of that testimony. He should have at least wanted to know why Mr. Lane was so anxious to call Dr. Gerow and as Mr. Lane put it, the failure to talk to an important witness is nothing less than malpractice.

(PCH, Page 97, Lines 1-4; RE 95):

> "Q A simple example of what you might have done differently, don't you think you should have talked to Dr. Gerow prior to having him put on that stand?
>
> "A I don't have an opinion on that. I don't know."

This counsel examined Donald Aimar in regard to a billing statement he prepared reflecting the time and energy he put into the Sechrest defense. The penalty phase took place a few days after the trial, September 26, 1983. Donald Aimar had not spoken to Dr. Gerow since August 22nd, 1983, more than a month before.

(PCH, Page 97, Lines 18-24, RE 95):

"Q It is true is it not it reflects you did not talk to him?

"A No. It reflects that I did talk to him. It doesn't reflect that I talked to him with specific reference to preparing him in the penalty phase.

"Q Would you look at the last date you talked to him?

"A It appears it is August 22, 1983."

No attorney wants to admit their failings. It subjects them to professional ridicule as well as possible proceedings by the State Bar. The record here is clear, the evidence overwhelming.

B) MILLS LANE'S TESTIMONY AT THE NOVEMBER 8, 1990, POST-CONVICTION HEARING.

The first witness called at the post-conviction hearing, November 8, 1990, was the prosecutor at the Ricky David Sechrest trial and penalty phase hearing. Mr. Lane remembered few of the particulars from the penalty hearing seven years before, but when asked about witness preparation, Mr. Lane was decisive. **Mr.**

Lane made it clear that it was "malpractice" for an attorney to put a witness on the stand without first speaking to them. Testimony of Mills Lane, November 8, 1990, in post-conviction hearing:

(PCH, Page 8, Lines 5-7; RE 95)(emphasis added):

"Q Do you ever put witnesses on the stand such as Gerow without having taken time to go and speak with them?

"A *Lord no.* If you do, you are guilty of malpractice."

It was later established through the examination of Donald Aimar and his own billings to the Court, that in fact Mr. Aimar had stipulated to Dr. Gerow's testimony without first discussing the prospective testimony with Dr. Gerow. This in spite of the fact that it was Mr. Lane who sought the testimony. Dr. Gerow testified as to Ricky David Sechrest's future dangerousness and also that Ricky David Sechrest had engaged in prior felonious conduct.

Mr. Lane later testified that he didn't know whether the prior allegations of felonious conduct which were described by Dr. Gerow were true or not, but he added:

(PCH, Page 13, Lines 17-19; RE 95):

"Q But I am asking you at the moment. Do you think it would be properly before the jury if in fact it wasn't true?

"A No."

In regard to the prejudice element, Mr. Lane further testified that Dr. Gerow's testimony was damaging.

(PCH, Page 20, Lines 16-1 8; RE 95) (emphasis added):

"Q Would you consider Dr. Gerow's testimony damaging to Mr. Sechrest?

"A *Absolutely*..."

C) FRED ATCHESON'S TESTIMONY AT THE NOVEMBER 8, 1990, POST-CONVICTION HEARING

Mr. Atcheson testified as an expert at the post-conviction hearing for Ricky David Sechrest. Testimony of Fred Atcheson, November 8, 1990, in post-conviction hearing:

(PCH, Page 113, Lines 12-24 and Page 114, Lines 1-2; RE 95):

"MR. LINDSAY: Okay. I was trying to get--specifically I am dealing specifically with this particular transcript in front of you which was the penalty phase.

"THE COURT: If you could remember the question, Mr. Atcheson, you can answer the question yes or no.

"THE WITNESS: As to certain factors, yes.

"BY MR. LINDSAY:

"Q It fell below the community standard?

"A Well, we get back into that trouble about standards again. I don't know if there are standards pertaining specifically to cases as bad as this. But I think that there were things done in the hearing that were not--were not effective, let's put it that way. And when I judge that, I judge it on the basis of I could see no rational basis for doing certain things."

Fred Atcheson, an experienced trial attorney, after reading the penalty phase transcript and listening to Donald Aimar's testimony explanations on November 8, 1990, concluded there was no "rational basis" for Donald Aimar's actions. Mr. Atcheson therefore concluded that Dr. Gerow's testimony could have been prevented.

(PCH, Page 114, Lines 10-11 ; RE 95):

"A I think that there is no question that Dr. Gerow could have been prevented from being called as a witness by Mr. Lane."

Prejudice was found by Fred Atcheson after he considered the penalty phase record.

(PCH, Page 115, Lines 10-17; RE 95):

"A Yes.

"Q Do you have an opinion as to whether or not Dr. Gerow's testimony was damaging?

"A Yes.

"Q What is that opinion?

"A It was very damaging.

"Q Can you think of any reason it should have been let in?

"A No."

Mr. Atcheson established that Donald Aimar's defense felt below that of reasonably competent defense counsel; that the testimony could have been prevented by invoking any one of a number of privileges; and that the testimony was unquestionably damaging and prejudicial.

D) DENNIS WIDDIS' TESTIMONY AT THE NOVEMBER 8, 1990, POST-CONVICTION HEARING.

Dennis Widdis was called as an expert on behalf of Ricky David Sechrest. His testimony speaks for itself. Testimony of Dennis E. Widdis, November 8, 1990, in post-conviction hearing:

(PCH, Page 136, Lines 3-24 and Page 137, Lines 1-7; RE 95):

"A Based upon my reading of the transcript as well as my reading of Dr. Gerow's original psychiatric report provided to Mr. Aimar, and based upon discussions with you concerning the status of the case as well as my experience and training in this area and my practice in Reno, Nevada in 1983, my opinion is that Mr. Aimar's performance fell below that which should be

expected of counsel in this type of case in this community in 1983.

"Q Could you be more specific, and let's start with Dr. Gerow, the testimony of Dr. Gerow? Do you have an opinion as to whether or not that testimony could have been prevented by Mr. Aimar?

"A There is no question that it could have been. The issue of prosecutor access to defense psychiatric reports, reports rendered by psychiatrists retained by the defense has been litigated personally by me. And I believe in this particular court we had quite an extensive proceeding in the Matthew Rowbottom case concerning that issue, and there is no doubt in my mind that based upon the assertion of the statutory privilege both attorney-client and doctor-patient under the case law, well, based upon the assertion of the privilege and Mr. Sechrest's Sixth Amendment right to effective representation of counsel through investigation by defense counsel, the prosecutor could have never been able number one to obtain the report nor validly talked to Dr. Gerow; and, number two, could have been prevented from presenting Dr. Gerow as a witness at the hearing. There is no legal basis at all for the State to have been able to call Dr. Gerow over objection at the penalty phase."

Dennis Widdis found Donald Aimar's performance to be inadequate; further that Dr. Gerow's testimony could have been prevented and that Dr. Gerow's testimony was "extremely damaging."

(PCH, Page 137, Lines 8-14; RE 95):

"Q Did you have a chance to read the testimony of Dr. Gerow?

"A I did.

"Q Focusing upon that testimony, did you find that testimony to be damaging in regard to the penalty phase in front of that jury?

"A In my opinion it was extremely damaging."

It was obvious that the State was going to claim that Donald Aimar's decision to allow Dr. Gerow's testimony was "tactical", based upon reason and sound judgment. Dennis Widdis was questioned regarding the Dr. Gerow testimony in light of Donald Aimar's explanation to the Court.

(PCH, Page 139, Lines 2-24 and Page 140, Lines 1-24 and Page 141, Lines 1-19; RE 95):

"Q Did you get a chance to listen to Mr. Aimar's explanation?

"A Well, as I recall from his testimony, his explanation was that he allowed Dr. Gerow to testify on the stand because he wished to humanize as I recall, wished to humanize, you know, Mr. Sechrest to the jury and believed that Dr. Gerow would be a good vehicle with which to accomplish that task.

"Q Okay. Would you for a moment consider his testimony and would you also consider what

happened there? Would you also consider that apparently he never talked to Dr. Gerow before letting him get on that stand. After considering those things, do you have an opinion as to whether or not that was a critical error in that penalty phase?

"A I do have an opinion.

"Q Could you give me that opinion?

"A It was a critical error. Would you like me to explain precisely why?

"Q Yes, if you would?

"A I think it is a critical error. Well, initially, regardless of 1983, 1990 or periods before, **the failure of defense counsel to interview a witness prior to allowing him to testify in virtually any case let alone a death penalty phase hearing is inexcusable**, to determine of course what he is going to say and what he could say that would be of any benefit or value to the defense in the case. At the time that Mr. Aimar had to make the decision as to whether or not to allow Dr. Gerow to testify and whether or not Dr. Gerow could aid in humanizing Mr. Sechrest to the jury, basically what he had was Dr. Gerow's report in front of him that had previously been provided. And when you read Dr. Gerow's report, there was nothing good to say about Mr. Sechrest in the report. It had very damaging evidence of or at least statements, you know, lack of eye contact between Mr. Sechrest and the doctor. The fact

that Mr. Sechrest admitted apparently to Dr. Gerow that he had not used drugs or was not intoxicated at the time of the crime on the day of the crime. The fact that, of course, he had used many drugs. The fact that he had been in trouble before. And when Dr. Gerow came to his conclusion, I forget the exact phrase, but it had something to do with polymorphous perversion. I think there was a phrase at the last paragraph of his report to Mr. Aimar which just to read it is scary. You know, polymorphous perversion. And when you have a witness who is of the opinion that your client is that type of person, it would be hard for me even in 1983 to look at it and say that witness could provide any beneficial testimony whatsoever for the defense. Certainly, if he was going to testify, you would want to talk to him to find out if there was anything good and a decision on whether or not to present that witness or to allow the State to present that witness would be a function of whether or not what good things he could get in outweighed the bad things that would come along with it. And in this case, looking at it not even from hindsight, but looking at it prospectively as an attorney, prior to the penalty phase having only the report in front of you and perhaps some initial conversation with Dr. Gerow, there would seem to me to be no way that I could foresee a tactical benefit accruing from having Dr. Gerow testify in many many areas of possible prejudice to the defendant.

"Q In fact that is what happened?

"A That's exactly what happened

"Q It was actually brought up in cross-examination by Mr. Lane and actually brought up in some of the direct examination of the Reverend-by Mr. Aimar was it not?

"A Correct.

"Q Mr. Aimar in fact got to a point where he was arguing against testimony of Mr. Gerow during the penalty phase?"

Dennis Widdis described allowing Dr. Gerow's testimony as a "critical error". Mr. Widdis also recognized that Donald Aimar was forced to argue against Dr. Gerow's testimony throughout the remainder of the penalty phase hearing.

(PCH, Page 142, Lines 2-6; RE 95):

"Q Mr. Lane testified today that to put someone on the stand without having talked to them, your witness, was malpractice. Would you agree with that?

"A Again, I think that is an overbroad statement, but it sure comes awful close."

Dennis Widdis found Donald Aimar's failure to talk with Dr. Gerow inexcusable.

(PCH, Page 146, Lines 8-24 and Page 147, Lines 1-17; RE 95):

"THE WITNESS: Okay Sure. The first answer is I guess the simple answer. It is not being flippant, but that is not what Don Aimar did.

When you read his closing, he didn't use the fact that, in my opinion and based upon my reading of the summation, didn't use Dr. Gerow's diagnosis of a mental illness whether he called it sociopathy or disassociative state. The fact he is diagnoseable to have a mental disease truly cuts both ways. Number one it scares jurors. They don't want to ever thing about "nut" or "a crazy person" every being released on the street again. Number two, it does however engender some sympathy. When I read the closing of Mr. Aimar, he didn't really argue sympathy to the jury based upon the mental disease, the diagnoseable psychiatric problem. That is the purported reason why he would want this to come in. And, true, this was a terrible set of facts. And I have been involved with other terrible sets of facts. And defense counsel's problem always is trying to find some way to engender a spirit from the jury of humanity, of life as opposed to death, some hope and some perhaps prognosis that he would change. A diagnoseable mental illness in my opinion based upon my, if I am handling the case, if the doctor, the psychiatrist, the mental health expert cannot couple with his diagnosis some hope for rehabilitation or treatment or change in the future. then that doctor's testimony is absolutely going to hurt you in front of the jury. And to the extent that Mr Aimar didn't have a lot to work with in this case, perhaps doing nothing except what he did with the other witnesses would have been better than allowing the prosecutor to parade an "expert" on the stand to testify against not only the attorney's client, but the doctor's patient. **There was a**

doctor-patient privilege there. For a doctor to come in and testify against his patient gave incredible, I think, credibility to the State's arguments that there is really nothing else we can do folks but give him the death penalty. So I see the testimony from Dr. Gerow as being very weighty."

E) ROBERT WITEK'S TESTIMONY AT THE NOVEMBER 8, 1990, POST-CONVICTION HEARING.

Robert Witek, after hearing the explanations offered by Donald Aimar, the same explanations which were also heard and considered by Fred Atcheson and Dennis Widdis, concurred entirely with the prior expert testimony. Testimony of Robert Witek, November 8, 1990, in post-conviction hearing:

(PCH, Page 169, Lines 17-20; RE 95):

"Q Would you please share that opinion with us?

"A I think his manner of representing Mr. Sechrest at least at the penalty phase as the transcript suggests was substandard."

(PCH, Page 170, Lines 12-23; RE 95):

"Q Could you tell us why?

"A In reading the transcript, Dr. Gerow was the first witness at the penalty phase as I recall. He was a witness because of a stipulation between

counsel. It has been my experience that at the penalty phase of a capital case there is very little that counsel are going to stipulate. That immediately caught my attention. **As I read what Dr. Gerow had to say, I began to ask myself what on earth has Mr. Aimar traded?** Why did he enter into this stipulation? I don't know how much of an answer you want, counsel, but I definitely felt that would not be a witness that in a light case I would have even wanted Mr. Lane to know about."

F. *STANDARD OF REVIEW.*

When "a psychiatrist designated by the trial court to conduct a neutral competency examination" goes beyond simply reporting on competence and testifies at the penalty phase, he becomes like "an agent of the State recounting unwarned statements made in a post-arrest custodial setting," and use of his testimony could violate the Fifth Amendment. Estelle v. Smith, 451 U.S. 454, 467, 101 S.Ct. 1866, 1875, 68 L.Ed.2d 359 (1981). A State risks violating Fifth Amendment rights by seeking to enhance its prospects for a death verdict through the introduction of statements made by the defendant during the course of a court-ordered psychiatric examination. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). When such statements are wrongfully used, the state is required to prove beyond a reasonable doubt that the error was harmless. Satterwhite & Chapman, *infra*.

Generally, the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S.

668 (1984). The general test is two-pronged, in that the Defendant must show first that counsel's performance was deficient and second, that the Defendant was prejudiced by this deficiency. However, where a Fifth Amendment violation is at issue, a different test must be employed.

Under *Strickland* standards, a defendant raising a claim of ineffective assistance of counsel must establish that counsel's performance was deficient, and that the deficiency prejudiced the defense. Strickland, 466 US. at 687, 104 S.Ct. at 2064. However, the instant claim of error warrants a Fifth Amendment analysis because defense counsel Aimar facilitated the violation of Sechrest's Fifth Amendment right against self-incrimination by permitting Gerow to testify about his psychiatric examination of Sechrest. A Fifth Amendment analysis shifts the burden to the State to prove beyond a reasonable doubt that any constitutional errors were harmless. Satterwhite v. Texas, 486 US. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Therefore, in the instant situation, Sechrest is not required to show the prejudice prong under Strickland. Once it has been shown that Aimar was ineffective as to the violations regarding the Gerow testimony, ***the burden shifts to the State to prove beyond a reasonable doubt that the Fifth Amendment violations which were caused by Aimar's ineffectiveness were harmless.***

G. FINDING OF IAC BY THE HONORABLE CHARLES M. MCGEE.

In this case, Aimar has been adjudicated ineffective by the Second Judicial District Court, the Honorable

Charles M. McGee, on November 8, 1990 for his performance (or lack thereof) regarding the testimony of Dr. Gerow. That decision was never appealed.

It is now incumbent upon the State to prove beyond a reasonable doubt that these Fifth Amendment errors were harmless.

Ineffective assistance of counsel has been found for a wide range of errors or failures, from *failure to properly investigate*, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), to *failure to call certain key witnesses*, Doleman v. State, 112 Nev. 843, 921 P.2d 278 (1996), to errors involving *counsel's conflict-of-interest*, Coleman v. State, 109 Nev. 1, 846 P.2d 276 (1993), to matters as simple as a *counsel's failure to object* to a prosecutor's impermissible comments on defendant's post-arrest silence, Washington v. State, 112 Nev. 1054, 921 P.2d 1253 (1996), or a *counsel's inability to phrase his questions* to a witness so as to elicit proper responses to his attempt to rebut certain inferences made by the State, Knorr v. State, 103 Nev. 604, 607, 748 P.2d 1, 3 (1987).

However, in the instant case, there is no need to prove that Sechrest's trial counsel was ineffective as to the Gerow testimony. **He has been already been adjudged ineffective.** What remains is for the State to meet its burden. If the State cannot meet its burden, then the Fifth Amendment errors regarding Gerow's testimony cannot be deemed to be harmless, and this Honorable Court must reverse the penalty phase of this case.

The Honorable Charles McGee erroneously applied the Strickland v. Washington, *infra*, standard to his

analysis of the prejudice which attached to trial counsel's ineffective representation of Sechrest. The Nevada Supreme Court affirmed Judge McGee's application of Strickland to these facts. The Nevada Supreme Court erroneously reasoned that the difference between Estelle v. Smith and its progeny, and the case at bar was that Sechrest's trial attorney didn't object to Gerow's (the psychiatrist's) testimony. Sechrest v. State, 108 Nev. 158, 161, 826 P.2d 564 (1992). Both the district court and the Nevada Supreme Court ignored the reality that trial counsel's failure to object was the basis upon which he was found to be IAC. That finding of IAC is the factor that crystalizes this issue: If trial counsel's failure to object was found to be IAC, how can that same failure thereafter be used to apply a lower standard of review to Sechrest's Estelle v. Smith claim regarding the damaging impact of the Gerow testimony and the obvious U.S. Constitutional Fifth Amendment violation.

H. *PROOF OF EXHAUSTION:*

1. Sechrest v. State, 108 Nev. 158, 160, 826 P.2d 564, 565 (1992).

1. Supplement to Petition for Post-Conviction Relief, filed January 13, 1986, pp. 18-27.

The Ninth Circuit Court of Appeals recognized this claim of error to be exhausted in the case of Sechrest v. State, 826 P.2d 564, 566-67, at page 3 of its August 27, 1998 Order.

VI. PRAYER FOR RELIEF

WHEREFORE, Petitioner, RICKY DAVID SECHREST prays that this Court:

1. Issue a writ of habeas corpus to have petitioner brought before it, to that end that Ricky David Sechrest might be discharged from his unconstitutional confinement and restraint, and/or relieved of the constitutional sentence of death, based upon one, several, or all of the claims asserted herein;

2. Conduct a hearing at which proof may be offered concerning the allegations in ths petition or any affirmative defenses raised by respondents;

3. Permit petitioner, who is indigent, to continue proceedings without prepayment of costs and fees, grant him authority to obtain subpoenas without fee for witnesses and documents necessary to prove the facts alleged in this petition, and grant him sufficient funds to secure expert testimony essential to prove the facts alleged in this petition;

4. As previous copy of requested records were never received by this counsel, require respondents, Robert Wieland of the Attorney's General Office, to bring forth a second copy of all pertinent records not previously produced, so that this counsel can review those parts of the record relevant to the issues and defenses raised in this proceeding, particularly the file from the District Attorney's Office which was ordered by Judge Reed to be delivered to the office of Robert Bruce Lindsay, Esq.;

5. Continue to stay petitioner's execution pending final disposition of this petition; and

6. Grant such other and further relief as, in the interests of justice, may be appropriate.

RESPECTFULLY SUBMITTED this 20th day of May, 1999.

/s/
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Nevada State Bar #002237
565 California Avenue
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(702) 786-7117

Attorney for Petitioner,
RICKY DAVID SECHREST

* * *

[Certificate of Service omitted in printing of this appendix]

APPENDIX J

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Case No. CV-N-92-536-ECR
[DEATH PENALTY CASE]

[Filed October 8, 1999]

RICKY DAVID SECHREST,	)
	)
Petitioner,	)
	)
vs.	)
	)
JOHN IGNACIO, et al.,	)
	)
Respondents.	)
	)

ANSWER TO THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Respondents, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and DAVID K. NEIDERT, Deputy Attorney General, respectfully answer RICKY DAVID SECHREST's ("Sechrest") Third Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody (Death Penalty Case). This Answer is based on the following points and authorities, as well as all documents, pleadings, and exhibits in this case.

I.

ANSWER

Pursuant to Rule 5 of the Rules Governing § 2254 Cases, Respondents respectfully inform the Court that pursuant to its previous orders and the Ninth Circuit Court of Appeals that all of the grounds contained within the Third Amended Petition are exhausted. Respondents deny all factual allegations and legal conclusions not found by a Nevada court.

The record has been previously filed with the Court.

II.

PROCEDURAL HISTORY

In dismissing Sechrest's direct appeal, the Nevada Supreme Court set forth the facts of the case in this manner:

In April of 1983, Doris Schindler hired Zella Weaver to baby-sit her ten-year old daughter, Maggie Schindler. In addition to caring for Maggie during weekday afternoons and evenings at the Schindler residence, Mrs. Weaver would pick Maggie up from the Meadowood Ice Arena when Maggie was through ice skating on Saturdays.

On May 14, 1983, a neighbor of the Schindler's drove Maggie and her friend, Carly Villa, to Meadowood and dropped them off to skate. Later that afternoon Mrs. Weaver went to Meadowood to pick up Maggie and Carly but could not find them. The police were notified, and an investigation was begun.

On June 7, 1983, the bodies of Maggie and Carly were found in Lagomarsino Canyon, a remote area east of Reno, by two young men who were out shooting. The bodies, which had been covered with loose dirt, were found about 50 yards apart. A pair of ice skates and skate guards with the name "Maggie S." on them were found near one of the gravesites.

Ricky David Sechrest is Zella Weaver's grandson and lived at her home. Sechrest had been seen outside the Schindler home several times while waiting to pick up his grandmother when she finished baby-sitting there. The record establishes that Maggie had been at the Weaver residence before and that Sechrest knew that his grandmother routinely picked Maggie up at Meadowood Mall on Saturdays.

On June 14, 1983, Sechrest gave an inculpatory statement to Officer Bogison and Detective Eubanks of the Reno Police Department while he was being questioned at the Sparks Police Department on an unrelated grand larceny charge. He admitted that he had picked up Maggie and Carly from the Meadowood Mall Ice Arena. He said that he asked Maggie if she wanted to go for a ride and she had agreed. They drove out to Lagomarsino Canyon. Sechrest claimed that they were walking around the hills rock hunting when Carly fell over backward and hit her head. Sechrest said he thought the girl was dead because when he checked her pulse, she did not have one. He said Maggie began to "freak out on him" and was "between hysterical and crying." Sechrest said that he knew it was wrong to be up there with the girls to begin with, so when Maggie began to run he panicked, caught her and hit her over the back of the head with a rock. After hitting the girl three or four more times with the rock after she had fallen, Sechrest went to his car and got a shovel. He returned to where Carly was lying and thought she was still alive; so he hit her "once or twice" in the head with the edge of the shovel. He then buried the girls with loose dirt. In his statement Sechrest admitted that he performed an act of masturbation on Maggie's body, but, according to him, at the time the girl was already dead.

A jury convicted Sechrest of two counts of first degree murder and two counts of first degree kidnapping. At the penalty phase, the jury set the penalty at death on each murder conviction.

> In addition, the trial judge sentenced Sechrest to life without possibility of parole on each of the two kidnapping counts.
>
> * * *
>
> Even without the confession there is sufficient evidence of Sechrest's guilt to support his conviction. Tanya Wagner, the friend with whom Maggie and Carly skated that day, identified Sechrest in court as the man who picked up Maggie and Carly at Meadowood. Sechrest knew the victim and was familiar with Lagomarsino Canyon. Police found a bloodstained shovel at Sechrest's residence which a forensic pathologist testified was consistent with the victim's skull fractures. Additionally, fibers found at the gravesites were consistent with fibers taken from Sechrest's car.

Exh. 71, pp. 1-3, 5; *Sechrest v. State*, 101 Nev. 360, 362-63, 366-67, 705 P.2d 626, 628-29, 631 (1985) (footnote omitted). The jury found four aggravating circumstances and no mitigating circumstances, setting Sechrest's sentence at death. Specifically, the jury found that Sechrest committed murder: (1) during the course of a kidnapping; (2) during the commission or attempted commission of a sexual assault; (3) for the purpose of avoiding a lawful arrest; and (4) in a manner involving torture, depravity of mind, or the mutilation of the victim. *Sechrest v. State*, 108 Nev. 158, 162, 826 P.2d 564, 567 (1992).

On his direct appeal, Sechrest raised the following issues:[1]

1. Did the trial court abuse its discretion and deny Sechrest a fair trial in refusing to appoint a second attorney?

2. Were Sechrest's statements to the police erroneously-admitted into evidence since Sechrest did not knowingly and intelligently waive his Fifth Amendment rights?

3. Was the jury improperly instructed in the penalty phase on the possibility of executive clemency?

4. Did the prosecutor engage in misconduct by discussing the possibility of executive clemency?

Exh. 67, pp. 1, 24-25.

The Nevada Supreme Court affirmed Sechrest's convictions and denied all of Sechrest's claims. Exh. 71; *Sechrest v. State,* 101 Nev. 360, 705 P.2d 626 (1985). New counsel was appointed and Sechrest filed a petition for state post-conviction relief. Exh. 79 (appointment of counsel); Exh. 80 (petition for post-conviction relief).

In Sechrest's petition, he apparently raised the following claims:

1. Ineffective assistance of counsel for failure to object to Dr. Gerow's testimony. Exh. 80, p. 5;

---

[1] Respondents have paraphrased the issues.

2. Ineffective assistance of counsel failing to offer a cautionary instruction about Sechrest's failure to testify;

3. Prosecutorial misconduct based on certain of the prosecutor's remarks. Exh. 80, p. 6.

After the state district court refused to grant a stay of Sechrest's execution, the Nevada Supreme Court granted a petition for a writ of mandamus ordering a stay of execution. Exh. 84 (Motion for Stay of Execution); Exh. 83 (Order denying stay of execution); Exh. 85 (Petition for Writ of Habeas Corpus, or in the Alternative, Petition for Writ of Mandamus or Writ of Prohibition); Exh. 88 (Order Granting Petition for Writs of Mandamus). Sechrest subsequently filed a Supplemental Petition for Post-Conviction Relief. Exh. 92.

In this supplemental petition, Sechrest raised the following claims:

1. Ineffective assistance of counsel for failing to object to calling Dr. Gerow as a prosecution witness and objecting to the contents of his testimony. Exh. 92, pp. 16-19.

2. Ineffective assistance of counsel for the defense attorney's cross-examination of Dr. Gerow. Exh. 92, pp. 22-25.

3. Prosecutorial misconduct for various comments made in closing argument in the penalty phase. Exh. 92, pp. 28-31.

4. Ineffective assistance of counsel for failing to

a. get a second psychological or psychiatric opinion on Sechrest's mental state. Exh. 92, p. 33;

b. use an insanity defense. Exh. 92, p. 34;

c. seek an order restricting the use of photographs. Exh. 92, p. 34; and

d. object to the prosecutor's remarks. Exh. 92, p. 34.

In the response to Sechrest's various pleadings, the Washoe County District Attorney, on behalf of the State of Nevada, distilled and identified Sechrest's claims in this manner:[2]

> 1. Failure to object or file a motion in limine precluding the state from using Dr. Gerow, Petitioner's own psychiatrist, in the State's case-in-chief at the penalty hearing.
>
> 2. Failure to object to isolated questions put to Dr. Gerow which were leading.
>
> 3. Failure to argue that the testimony of Dr. Gerow violated Petitioner's Fifth Amendment right against self-incrimination, for Dr. Gerow was, in Petitioner's opinion, a police agent.
>
> 4. Failure to argue that Petitioner's admissions to Dr. Gerow were unreliable.

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[2] Respondents have paraphrased Sechrest's claims from his pleadings but are quoting the Washoe County District Attorney in this section.

5. Failure to argue that Petitioner's admissions to Dr. Gerow involving prior criminal conduct was irrelevant under NRS 48.025 and NRS 200.033.

6. Failure to argue that Dr. Gerow's testimony was inflammatory, prejudicial or of no probative value.

7. Failure to argue that offenses which Petitioner admitted to Dr. Gerow were committed while Petitioner was a juvenile.

8. Failure to argue that the admitted offenses were really aggravating circumstances of which Petitioner had not been noticed.

9. Failure to seek a second, contradictory opinion to that of Dr. Gerow.

10. Failure to properly cross-examine Dr. Gerow.

11. Failure to prepare for proper cross-examination of Dr. Gerow.

12. Failure to object to isolated questions put to Dr. Gerow by the prosecution while testifying on direct.

13. That petitioner was denied ineffective [sic] assistance of counsel by virtue of being represented buy only one attorney, while the State was represented by two attorneys.

Exh. 93, pp. 12-13.

On November 8, 1990, the state district court held an evidentiary hearing on Sechrest's petition. Exh. 95. The state court allowed supplemental briefing by both sides. Exh. 96 (Arguments in Support of Post-Conviction Hearing November 8, 1990); Exh. 100 (Opposition to Post-Conviction Relief); Exh. 101 (Reply to Opposition to Post-Conviction Hearing November 8, 1990); Exh. 102 (Supplemental Points and Authorities in Support of Opposition to Petition for Post Conviction Relief).

The state district court issued an order on January 14, 1991. Exh. 103. The Court focused the issue as follows, quoting Sechrest's argument in post-trial briefing:

> Simply stated, it is Petitioner's contention that the conduct of Donald Aimar at the penalty phase fell below the acceptable standard for competency for a criminal defense attorney in a death penalty case. Specifically, Don Aimar allowed the testimony of Dr. Gerow at the request of Mills Lane, the district attorney in the case, without first talking to Dr. Gerow regarding his prospective testimony and thereafter, Don Aimar failed to properly object to the use made of that testimony by Mills Lane in cross-examination of various witnesses and in the final arguments made to the death penalty panel of jurors.

Exh. 103, pp. 1-2 *(quoting* Exh. 98, pp. 1-2). In its decision, the Court analyzed various testimony and concluded:

> Mr. Aimar should have fully interviewed Dr. Gerow first and he should have calculated more precisely whether the potential risks of the physician's testimony outweighed the potential gain from his testimony. Plainly, the "balance" of Dr. Gerow's testimony does not favor Mr. Sechrest. It favors the State. For this reason, the Court finds that in this narrow circumstance, the level of Mr. Aimar's professional effort fell below that which the standards expect from an attorney in a capital case.

Exh. 103, p. 5. However, the Court went on to ask the rhetorical question, "'Was Dr. Gerow telling the Sechrest jury anything it did not already know?'" *Id.* at p. 8. The Court went on to answer its own question:

> [V]iewed from an objective standpoint, the evidence does not seem to be enough to have "tipped the balance." Dr. Gerow's testimony can instead be viewed in simply another way of describing the side of Sechrest which was already before the jury in the starkest fashion possible. In terms of its potential inflammatory effect it may be likened to smoldering ember; the jury had already been exposed to the fire itself. Dr. Gerow's testimony could not have unduly inflammed [sic] this panel of jurors; it could have helped to explain the inflammation which was already there to be seen.
>
> * * *
>
> Our case does not involve the credibility of Mr. Sechrest on issues of guilt; what it instead

involves is his character and personality for purposes of meriting capital punishment. . . . Mr. Lindsay further argues that the jury was exposed through Dr. Gerow's testimony to a record of previous criminal history by Sechrest, that the jury unnecessarily learned of charges of burglary, possession of stolen property, and narcotics in Illinois, Kentucky, and Nevada (see pp. 5 and 6 of the Penalty Hearing transcript and the further reference in closing argument at p. 114).

* * *

But can it be reasonably argued that a passing reference to a couple of property crimes and a victimless narcotics charge persuaded this jury to go with the death penalty? Hardly.

Perhaps this very kind of evidence could be used to support the proposition that Sechrest was more dangerous than a person without this past kind of record, but Sechrest's dangerous to future homeowners or possessors of property is certainly care of almost as much by life in prison without parole as it could have been by imposing the death penalty.

This Court does not feel that it can be reasonably maintained that the Sechrest jury was focusing upon some remote possibility of future harm to society because of the commission of a property offense or a drug crime; they were focusing upon the immediate impact upon society of the heartless bludgeoning of two little girls.

> There are capital cases which seem borderline because of the confused mental state of the Defendant or perhaps the degree of provocation from the victim or victims. There are capital cases which seem borderline because of the motive of the Defendant or because of some mitigating aspect about his or her character. In a given case, evidence of profound remorse can play a role.
>
> Nothing like these circumstances are present in the case of Ricky Sechrest. This Court does not feel that this case is borderline, or that Ricky Sechrest was denied a fair hearing.

Exh. 103, pp. 10-11. The Court then denied Sechrest's petition.

Sechrest appealed and the case was fully briefed. Exh. 105 (Appellant's Opening Post-Conviction Brief); Exh. 107 (Appellant's Reply Brief); Exh. 112 (Respondent's Answering Brief). In his appeal, Sechrest argued that Aimar was ineffective for allowing Gerow's testimony and that while normally governed by *Strickland v. Washington*, 466 U.S. 668 (1984), the State should be required to prove that Dr. Gerow's testimony was harmless beyond a reasonable doubt. Exh. 105, p. 34. The State disagreed, arguing that even if Aimar was ineffective, Sechrest was required to prove that he was prejudiced by his attorney's conduct. Exh. 112, pp. 3-4, 15-16.

The Nevada Supreme Court affirmed the district court and agreed with the State's arguments. *Sechrest v. State*, 108 Nev. 158, 826 P.2d 564 (1992). The

Nevada Court however, found that the proper test was that found in *Strickland*:

> A state risks violating fifth amendment rights by seeking to enhance its prospects for a death verdict through the introduction of statements made by the defendant during the course of a court ordered psychiatric examination. When such statements are wrongfully used, the state is required to prove beyond a reasonable doubt that the error was harmless.
>
> In the instant case, however, the defendant's statements were not improperly obtained or used. Dr. Gerow's psychiatric examination of Sechrest was ordered *at the request of the defense*. The State later sought and obtained permission to use Gerow's testimony during the penalty hearing. In contrast, *Satterwhite [v. Texas*, 4586 U.S. 249 (1988)]; and *Estelle [v. Smith*, 451 U.S. 454 (1981)] involved situations where defense counsel was not the moving force behind the psychiatric examination that was introduced over the objection of counsel. Additionally, the trial courts in *Satterwhite* and *Estelle* were required by Texas law to impose the death penalty if the jury answered certain questions affirmatively, including the question whether the defendant posed a continuing threat to society. The psychiatric testimony in those cases addressed the latter question, and thus impacted a crucial issue. In contrast here, although Gerow opined that Sechrest would not change, Nevada has not designated future dangerousness as an aggravating circumstance

> upon which the death penalty may be considered.
>
> Gerow's testimony did not implicate any of the aggravating circumstances which were found by the jury as a basis for imposition of the death penalty. Sechrest's statements were properly communicated to Gerow, and introduced with the consent of defense counsel. Neither federal not state law supports an assertion that Sechrest's fifth amendment rights were violated. Thus, the issue is one of ineffective assistance of counsel to which the *Strickland* test applies.

Sechrest, 108 Nev. at 160-61, 826 P.2d at 566 (citations omitted) (emphasis in original). The Nevada Supreme Court concluded by finding, "[I]t is clear beyond a reasonable doubt that no error occured that would have caused the jury to conclude that the four aggravating circumstances were outweighed by the arguably mitigating factor no matter how strongly it may have been established. 108 Nev. at 162; 826 P.2d at 567.

Sechrest then filed his petition in this Court, which was dismissed because it contained unexhausted claims. *Sechrest v. Ignacio*, 943 F.Supp. 1253 (D.Nev. 1996). As this Court is aware Sechrest appealed and the Ninth Circuit affirmed, sending the case back to this Court. Sechrest subsequently filed his Third Amended Petition, which is properly before the Court for decision.

III.

SECHREST's THIRD AMENDED PETITION IS MERITLESS

1. The Prosecutor Did Not Engage In Misconduct.

In his first claim, Sechrest argues that the trial prosecutor, Mills Lane, engaged in misconduct by discussing the issue of executive clemency. The Nevada Supreme Court dealt with the issue with almost a passing reference,

> Sechrest finally raises an issue of prosecutorial misconduct. He cites as prejudicial error several remarks the prosecutor made to the jury concerning an instruction which informed the jury of the power of the State Board of Pardons Commissioners to modify any sentence the jury imposed. We have carefully examined the statements and the context in which they were made. We conclude that they do not either individually or cumulatively rise to the level of prejudicial error warranting reversal.

Sechrest v. State, 101 Nev. 360, 368, 705 P.2d 626, 632 (1985). In federal habeas corpus, the narrow issue whether there is a violation of due process, and not whether there is misconduct under the federal court's broad exercise of supervisorial power. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The *Darden* Court also observed that it "'is not enough that the prosecutor's comments were undesirable or even universally condemned.'" *Id.* (*quoting Darden v. Wainwright*, 699 F.2d, 1031, 1036 (11th Cir. 1983)).

The Ninth Circuit has cited *Darden* and held that for a prosecutor's comments to be subject to federal habeas corpus review, the alleged misconduct must be of constitutional dimension. *Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir. 1996); *Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995). This Court's task is to examine the entire proceedings to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting trial a denial of due process. *Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991) (per curium). The Second Circuit has held that the failure of the defense attorney to object to misconduct demonstrates counsel did not discern any prejudice. *Adams v. Aiken*, 965 F.2d 1306, 1318 (2nd Cir. 1992).

In his petition, Sechrest objects to the following comments made by the trial prosecutor:

"The judge is giving you an instruction at the penalty phase, if we get there, that he will impose the penalty that you say, but if you say life in prison without parole, that doesn't mean the pardon's board can't let him out. Now would you consider that when you arrive at your verdict?" Exh. 41, p. 170. However, two observations must be made about this question. First, immediately before the quoted language, the prosecutor stated, "I just have one, Judge, if you don't mind. It didn't really come up. Mr. Aimar keeps asking it." *Id.* Second, Sechrest's trial counsel did not object.

"And His Honor will, imagine, because may times I have been in front of His Honor, will give you a charge, a jury instruction saying if you impose life without parole that really doesn't mean life forever. If he gives you that charge, will you take that into

consideration in deciding what the verdict out to be?" Exh. 41, p. 226. Again, two observations need to be made, first, the prosecutor prefaced this question with the following introductory statement. "Okay. Now, Mr. Aimar has talked a lot about the possible penalties if we get there being life with the possibility of parole, life without the possibility of parole, or death." *Id.* Second, just as with the previous question, defense counsel did not object.

Sechrest also objects to the following two comments made by the prosecutor in the penalty stage:

> Now, the judge has told you that if you return a verdict, whatever that verdict you return, he will impose. He also told, you, and it is very important under the laws of this State, the State of Nevada, any sentence imposed by the jury may be refused by the State Board of Pardon Commissioners. Whatever sentence you impose in your verdict, this court will impose that sentence. Whether or not the State Board of Pardon Commissioners, upon review, if requested by the defendant, would change that sentence, the Court has no way of knowing. Indeed, you don't either. The State Board of Pardon Commissioners, however, would have the power to modify any sentence at a later date. And that means is, let's say you fall–I am going to talk about his defense. It was a fraud. And let's say you fall for that fraud and you say, well, gee, I just can't bring myself to do what I should do, and I am going to impose life without parole. You don't die in prison of old age. People get out. Now, are you prepared to risk the life of some other person or child by giving him the

> opportunity to get out? That will be your risk. That will be your burden.

Exh. 145, p. 102. Again, defense counsel did not interpose an objection.

> Never getting out. As the judge has instructed you, the pardons board has the ultimate authority to review any sentence, to pardon anybody. If you return a verdict of life without possibility of parole, I represent to you as a lawyer as an attorney for the people of this county, that the pardons board has the authority to commute that tomorrow if they want to. They won't, of course, but they have the authority to. So don't buy that he is going to jail forever. It just doesn't happen.

Exh. 145, p. 129. As with the other cited examples, Aimar did not object.

At this juncture, Sechrest wishes to ignore two very important points. First, the United States Supreme Court has held that it is proper for a court to give an instruction on the possibility of clemency in a capital sentencing. *California v. Ramos,* 463 US. 992, 1003 (1953). Second, Sechrest rests his challenge on Nevada decisional law which post-dates the denial of his direct appeal.

Sechrest indirectly attacks the clemency instruction which the trial court gave. He posits that the court should have given the instruction the Nevada Supreme Court mandated in *Petrocelli v. State*, 101 Nev. 46, 57, 692 P.2d 503, 511 (1985). However, the Nevada Supreme Court clearly made the *Petrocelli* instruction

prospective. *Id.* Significantly, Sechrest was tried two years before the *Petrocelli* decision was announced.

The instruction given in Sechrest's case was a correct recitation of Nevada law. Exh. 51, Instruction 15 which read:

> If the penalty is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served.
>
> If the penalty is fixed at life imprisonment without the possibility of parole, the defendant shall not be eligible for parole.
>
> Under the laws of the State of Nevada, any sentence imposed by the jury may be reviewed by the State Board of Pardon Commissioners. Whatever sentence you return in your verdict, this Court will impose that sentence. Whether or not the State Board of Pardons Commissioners upon review, if requested by the defendant, would change that sentence, this Court has no way of knowing. The State Board of Pardon Commissioners, however, would have the power to modify any sentence at a later date.

Instruction 15 correctly stated the penalties Sechrest faced and it correctly noted that there was a mechanism under Nevada law for commutation. Additionally, unlike the petitioner in *Gallego v. McDaniel*, 124 F.3d 1065 (9th Cir. 1997), there was no conflicting Nevada law which would make the instruction inaccurate either factually or legally. *See*

Id. at 1076 (discussion of why given clemency instruction in that case was error).[3]

As a result, the prosecutor's comments were not improper. Instead, they were a valid comment on Sechrest's future dangerousness. While the prosecutor's argument may have been a somewhat simple statement of the law concerning the Nevada Board of Pardons Commissioners, they were, nonetheless correct at the time they were given. Since the statements were correct, there could be no misconduct.

Further, even if the comments could somehow be construed as improper, there is no way that Sechrest can coherently argue that the comments denied him either a fair trial or penalty hearing.[4] The evidence of Sechrest's guilt was overwhelming, which included his confession, and his crime truly horrendous: the brutal murder of two small children, followed by Sechrest's necrophilic masturbation over one of the victim's bodies. Thus, the comments really cannot be construed as to have violated his right to a fair penalty hearing and due process.

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[3] Sechrest's argument that the "prosecutor's argument, coupled with the instruction, infers that a life sentence without possibility of parole may be commuted, but fails to inform the jury that a death sentence may also be pardoned" is clearly erroneous, given a plain reading of the instruction given, which states that "*any sentence* may be reviewed. . . ."

[4] The prosecutor's arguments which Sechrest complains of occurred during closing argument of the penalty phase–not the guilt phase, although the questions did occur during the *voir dire* of the jury.

The United States Supreme Court has held that for there to be error warranting federal habeas corpus, the error must have "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (*quoting Kotteakos v. United States,* 328 U.S. 750, 776 (1946)). The Ninth Circuit Court of Appeals has concluded, "Only if the record demonstrates that that jury's decision was substantially influenced by the trial error or there is 'grave doubt' about whether an error affected a jury in this way" will Sechrest be entitled to relief. *Hegler v. Borg*, 50 F.3d 1472, 1478 (9th Cir. 1995). The prosecutor's comments, even if error, do not meet this standard.

2. **Sechrest Was Not Entitled To A Second Attorney At His Trial.**

Sechrest next argues that he was entitled to a second attorney at his trial. Respondents are aware of no court which has ever *required*, pursuant to the Sixth Amendment, that more than one attorney represent *any* defendant in *any* trial. There may be some truth to the cliché that "two heads are better than one." However, in this case, the issuance of a writ of habeas corpus may not be granted unless Sechrest is held "in custody in violation of the Constitution, law or treaties of the United States." 28 U.S.C. § 2241(c)(3).[5] Since there is no constitutional or other federal legal right to multiple counsel, the claim is not

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[5] This section was amended with the adoption of the Anti-terrorism and Effective Death Penalty Act ("AEDPA"). However, this petition is governed by the former provisions.

cognizable in federal habeas corpus and must be dismissed.

Additionally, any such rule would be a new rule, barred pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* bars federal habeas corpus review if the claim rests on a "new rule" which "breaks new ground or imposes a new obligation on the State or the Federal Government [or] if the result was not *dictated* by precedent." *Id.* at 301 (emphasis in original).

Even if there were some amorphous right to multiple counsel in complex legal cases, this is not such a case. While framed in the Nevada Supreme Court as an issue of abuse of discretion, the Court addressed the issue in this manner:

> Sechrest next argues that it was an abuse of discretion for the trial court to deny his request for an additional attorney to represent him. We conclude otherwise.
>
> On June 30, 1983, defense counsel filed a motion for appointment of another attorney to assist him in Sechrest's defense. The reasons given for requesting additional counsel were: complexity of the issues, severity of the penalty, and other special circumstances. The court denied the motion. Counsel asked leave to renew the motion for appointment of additional counsel at a later date. However, the motion was never renewed. Trial was set for September 12, 1983, and proceeded without further defense objection.
>
> * * *

> In the instant case there were few pre-trial motions, including the request for an additional attorney. The defense theory was that Sechrest had indeed killed the girls and raised as a defense only the absence of deliberation and premeditation. This theory eliminated the need for much of the investigatory work that would normally have to be done. The state ultimately called only twenty-one witnesses, and the trial lasted one and one-half weeks. Additionally, defense counsel was able to employ the services of a student legal research assistant.
>
> We conclude that although a capital case represents a complex form of litigation, these facts make it clear that an undue degree of preparation and investigation was not required, nor was an unreasonable burden placed on Sechrest's counsel. Indeed, as previously noted, defense counsel never sought to renew the motion for additional counsel. Under the facts of this case we find no abuse of discretion.

Sechrest v. State, 101 Nev. 360, 367-68, 705 P.2d 626, 631-32 (1995). Thus, the Nevada Supreme Court noted that this was a relatively straightforward case and that defense counsel did not renew the motion, even though he could have done so. If this claim is somehow cognizable, it is also without merit.

3. Sechrest's Confession Was Properly Admitted.

Sechrest next argues that his confession should have been suppressed. The United States Supreme Court has long held that during custodial interrogation

a suspect must be advised of the right to remain silent and the right to speak with an attorney before questioning. *Miranda v. Arizona,* 384 U.S. 436, 467-68 (right to remain silent); 471-72 (right to counsel before questioning) (1966). The *Miranda* Court also noted, "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his right privilege against self-incrimination and his right to retain or appointed counsel." *Id.* at 475.

Later, the Supreme Court held that if a defendant requested to speak with an attorney, all custodial questioning must cease if a suspect has clearly asserted his right to have counsel present. *Edwards v. Arizona,* 451 U.S. 477, 485 (1981). *Edwards* also held that "any further communication, exchanges, or conversations with the police" that the suspect himself initiates are perfectly valid. *Id.*

Subsequently, the Court decided the issue of "how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning" *Davis v. United States,* 512 U.S. 452, 454 (1994). The *Davis* Court noted that officers (and courts) must use an objective test in determining whether a suspect has requested counsel. *Id.* at 459. *Davis* went on to hold:

> [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in the light of the circumstances would have understood only that a suspect *might* be invoking a right to counsel,

> our precedents do not require the cessation of questioning.
>
> Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the suspect fails to meet the requisite level of clarity, *Edwards* does not require that officers stop questioning the suspect.

Id.

In another line of cases, the Supreme Court held that once a suspect invokes his right to counsel in the context of custodial interrogation, he may not be questioned about unrelated offenses, either. *Arizona v. Roberson*, 486 U.S. 675 (1988). However, the Supreme Court subsequently held that *Roberson* announced a "new rule" and, as a result, is not retroactive in federal habeas corpus proceedings. *Butler v. McKeller*, 494 U.S. 407, 408 (1990). Because Sechrest's conviction became final in 1985, *Roberson* is inapplicable.

In order Sechrest to prevail on his Fifth Amendment claim, he "must demonstrate that: (1) his statements were obtained by the police in violation of Miranda; (2) the state court committed error in permitting the prosecution to use these improper statements; and (3) the error had a substantial and

harmful influence on the jury's determination of its verdict." *Henry v. Kernan*, 177 F.3d 1152, 1155 (9th Cir. 1999).

The Nevada Supreme Court discussed the facts of Sechrest's confession in this manner, which are presumptively correct pursuant to 28 U.S.C. § 2254(d):[6]

> Pursuant to the investigation of a grand larceny, Sechrest was approached on June 14, 1983, by officers from the Sparks Police Department. Advising Sechrest of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), Detective Wright asked him if he wanted to talk about the grand larceny charge. Sechrest replied that he wanted an attorney. Officers asked no further questions but took Sechrest to the Sparks Police Department for booking. While waiting to be booked, Sechrest turned to Detective Wright and Sergeant Gonyo and said: "I like you two guys, I don't want an attorney. I will talk to you." The officers proceeded with the booking and afterwards Sechrest was given a standard rights waiver form, which he read and signed in the presence of the officers. During questioning Sechrest stated that the Reno Police were investigating him as a possible suspect in a homicide. Sparks Police did not question Sechrest regarding the homicide but, rather, told him that they were only interested in the grand larceny charge.

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[6] Pre-AEDPA.

After the interview was finished, Sergeant Gonyo left the room and then returned to inform Sechrest that Officer Bogison of the Reno Police Department was outside. Sergeant Gonyo asked Sechrest if he would like to talk to Officer Bogison, and Sechrest replied: "Yes, I like Mr. Bogison, he is the only one on my side and he understands me." Officer Bogison then approached Sechrest and said: "I understand you want talk to me, is that right?" Sechrest replied: "Yes." Sechrest said that he had spoken with his attorney and had been advised to keep his mouth shut. In response, Bogison said: "Well, there is nothing we can do to alter that. . . . do you want to talk to me?" Sechrest replied: "I will tell you what, I will make a deal–no, I won't make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won't." Bogison then said: "Does that mean you want to talk to us?" Sechrest replied: "Yes."

After the foregoing conversation Officer Bogison, Detective Eubanks and Sechrest entered an interrogation room. Sechrest requested that he be permitted to call his grandmother and also his attorney. After Sechrest spoke with his grandmother, Officer Bogison asked him: "Do you want to talk to your attorney?" Sechrest replied: "No, I want to get this off my chest." He then made the statement in which he confessed to the murders.

Sechrest v. State, 101 Nev. 360, 363-64, 705 P.2d 626, 629 (1985) (footnotes omitted).

In this case, the record is clear that Sechrest invoked his right to counsel. The police then *immediately* ceased questioning him. The record is also clear that *Sechrest* reinitiated contact with the police when he recognized a Sparks Police Officer during the booking process. Under the *Edwards* test, the police acted appropriately in both ceasing questioning and in questioning Sechrest anew when Sechrest spontaneously decided to speak with them.

When the Sparks Police concluded their questioning concerning the unrelated burglary, Sechrest was asked if he wanted to speak to Reno Police. According to the record, the Reno officers asked Sechrest at least three times whether he wanted to speak with them. Sechrest assented each time.

Sechrest also made a request to speak with his grandmother and his attorney. After speaking with his grandmother, the police asked him if he wanted to speak with his attorney. Sechrest declined and subsequently confessed to the murders. However, as the Nevada Supreme Court noted in dismissing Sechrest's appeal,

> After Sechrest and the officers entered the interrogation room, Sechrest requested that he be allowed to telephone his grandmother and also his attorney. After Sechrest spoke to his grandmother, Officer Bogison asked if he then wished to talk to his attorney. Sechrest replied: "No. I want to get this off my chest," Officer Bogison's question followed Sechrest's telephone conversation with Sechrest's grandmother and was a reasonable attempt to clarify whether Sechrest then wished to telephone his attorney.

> Sechrest's answer to the inquiry was clear. Sechrest wanted to get the matter "off his chest." Under these circumstances, it cannot be said that officers proceeded with the interrogation in violation of Sechrest's fifth and sixth amendment rights.

Sechrest v. State, 101 Nev. 360, 366, 705 P.2d 626, 630-31 (1985). Respondents agree with this analysis *en toto* and adopt it as their own.

Thus, the facts in *Sechrest* are very different from the police conduct deplored in *Collazo v. Estelle*, 940 F.2d 411, 416 (9th Cir. 1991) *(en banc)*. Like this case, the petitioner in *Collazo* made a request for counsel, spoke with a relative (in *Collazo* it was the petitioner's wife, who was also a legal secretary), and then agreed to speak with police. However, the dispositive difference between this petition and *Collazo* is that the police in *Collazo* engaged in coercive tactics and clear misconduct instead of ceasing questioning. *Id.* at 416-18.[7] In this case, on the other hand, the police scrupulously observed Sechrest's rights and merely clarified whether Sechrest wished to immediately speak with an attorney after he had conversed with his grandmother.

Unlike *Collazo*, there was no *Miranda* violation in Sechrest's case. In deciding *Collazo*, the Ninth Circuit made it clear that the coercive police tactics directly led to Collazo's decision to speak with police. 940 F.2d

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[7] *Collazo* notes that the State of California freely admitted that *Collazo's Miranda*-rights occurred. Respondents make no such concession in this case because no *Miranda* violation occurred.

at 421-22. Indeed, the Ninth Circuit makes it clear that any analysis on whether a suspect reinitiates communication with the police must look at "the entire transaction." *Id.* at 423. A examination of "the entire transaction" in Sechrest's case amply demonstrates that the police acted properly.

Sechrest also makes much of the fact that the Reno officers did not *Mirandize* Sechrest when the Sparks Police concluded their interview. However, the facts are clear that temporally the Reno Police interview immediately followed the Sparks Police interview and that Sechrest was well-aware of his right to remain silent. There is no authority for the proposition that *Miranda* warnings are offense-specific and that an in custody suspect must be given *Miranda* warnings anew because the topic of conversation has changed.[8]

Sechrest next claims that he did not "knowingly and intelligently" waive his right to counsel. That assertion is belied by the record. The test is whether Sechrest "knowingly and voluntarily" waived his rights. *Colorado v Spring*, 479 U.S. 564, 573 (1987). The *Spring* Court directly quoted its holding from a case decided the previous year. *Moran v. Burbine*, 475 U.S. 412 (1986). The *Moran* Court explained:

> First the relinquishment of the right must have been voluntary in the sense that it was a

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[8] Sechrest also complains that police knew that he was represented by Don Aimar and this knowledge tainted his confession. However, the Sixth Amendment Right to counsel is offense specific and inapplicable to a *Miranda* challenge based on the Fifth Amendment. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

> product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that *Miranda* rights have been waived.

Id. at 421 *(quoting Fare v. Michael C.*, 442 U.S. 707, 725 (1979). The *Spring* Court pointedly noted, "The Constitution does not require that a criminal defendant know and understand every possible consequence of a waiver of a Fifth Amendment privilege." *Spring,* 497 U.S. at 574. Without any analysis, Sechrest merely argues that his confession was not knowingly and intelligently made. The facts of his confession, as set forth in this Answer, clearly repudiate that assertion.

Finally, even if Respondents are incorrect in their analysis, any error through the admission of Sechrest's confession was harmless. As the Nevada Supreme Court noted,

> Even without the confession there is sufficient evidence of Sechrest's guilt to support his conviction. Tanya Wagner, the friend whom Maggie and Carly skated that day, identified Sechrest in court as the man who picked up Maggie and Carly at Meadowood. Sechrest knew the victims and was familiar with Lagomarsino Canyon. Police found a

> bloodstained shovel at Sechrest's residence which a forensic pathologist testified was consistent with the victims' skull fractures. Additionally, fibers found at the gravesites were consistent with fibers taken from Sechrest's car.

Sechrest v. State, 101 Nev. 360, 366-67, 705 P.2d 626, 631 (1995).

The United States Supreme Court has held that for there to be error warranting federal habeas corpus, the error must have "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Ninth Circuit Court of Appeals has concluded, "Only if the record demonstrates that that jury's decision was substantially influenced by the trial error or there is 'grave doubt' about whether an error affected a jury in this way" will Sechrest be entitled to relief. *Hegler v. Borg*, 50 F.3d 1472, 1478 (9th Cir. 1995).[9] Based on the strength of the State's case, there can be such doubt. Even had the confession not been heard by the jury, Sechrest would have been convicted.

This conclusion is particularly compelling because of Sechrest's defense theory, in which Sechrest admitted he had killed the two little girls but denied

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[9] There is an exception if the error is "structural." If there is "structural error," the conviction must be reversed regardless of the strength of the State's case. However, an invalidly admitted confession is not "structural." *See Sherman v. Smith*, 89 F.3d 1134, 1137-38 (4th Cir. 1996) (*en banc*) (listing trial errors, including improperly admitted confessions) (*citing Milton v. Wainwright*, 407 U.S. 371, 377 1972)).

doing so with the deliberation and premeditation required for a conviction for the crime of First Degree Murder. The confession was *consistent* with Sechrest's legal theory, which the jury rejected.

Sechrest's contention that his confession was involuntary is without merit and should be denied by this Court.

4. Sechrest's Fifth Amendment Rights Were Not Violated By Dr. Gerow's Testimony.

Sechrest next claims that his Fifth Amendment rights were violated because the state called Dr. Lynn Gerow, a psychiatrist, who had previously interviewed Sechrest at the request of the defense. Because there was no Fifth Amendment violation, the claim lacks merit.

The United States Supreme Court first visited the issue of psychiatric testimony in the penalty phase of a capital case in 1981. *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, the Supreme Court held that a psychiatrist, appointed by the court to conduct a competency examination, could not testify about conversations he had with the defendant because the defendant had not been given the Fifth Amendment warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). *Estelle*, 451 U.S. at 468. The *Estelle* Court held:

> A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing

> proceeding. Because respondent did not did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson [the psychiatrist] to establish his future dangerousness. . . . [W]e must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them.

Id. at 468-69 *(quoting Miranda,* 384 U.S. at 478).

Later, the United States Supreme Court noted the "distinct circumstances" of *Estelle*. *Buchanan v. Kentucky*, 453 U.S. 402, 422 (1987). Indeed, one way in which *Buchanan* was differentiated from *Estelle* was the fact that the defense in *Buchanan* joined in the request for a psychiatric examination. *Id.* at 423. In Sechrest's case, the defense did not *join* in a request for a psychiatric examination, it *initiated* the psychiatric examination. At least one federal court has recognized this distinction as being dispositive. *Williams v. Vasquez,* 517 F.Supp. 1443, 1466 (E.D. Cal. 1993), *aff'd sub nom., Williams v. Calderon*, 52 F.3d 1465 (9th Cir. 1995).[10]

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[10] This issue was not discussed in the Ninth Circuit's decision.

The Nevada Supreme Court factually differentiated the facts of Sechrest's case from *Estelle*. These facts are presumptively correct. 25 U.S.C. § 2254(d). The Nevada Supreme Court noted, "Dr. Gerow's psychiatric examination of Sechrest was ordered *at the request of the defense*. The State later sought and obtained permission to use Gerow's testimony during the penalty hearing." *Sechrest v. State*, 108 Nev. 158, 161, 826 P.2d 564, 566 (1992) (emphasis in original). The fact that Gerow was Sechrest's expert, and not the State's expert, suggests no Fifth Amendment violation. *See James v. Borg*, 24 F.3d 20, 28 (1994) (state had "substantially better argument" in noting, among other things that the psychiatrist was defense expert); *United States v. Roston*, 986 F.2d 1287, 1292 (9th Cir. 1993) (after noting *Estelle*, holding, "The question is whether the person with whom the defendant speaks is involved 'on behalf of the state'").[11]

Even if a Fifth Amendment violation somehow occurred, the Nevada Supreme Court sagely held, in rejecting Sechrest's claim and finding a lack of prejudice:

> In the penalty phase, the jury found four aggravating circumstances for each murder. Specifically, the jury found that the murders were committed: (1) during the course of a kidnapping; (2) during the commission or attempted commission of sexual assault; (3) for the purpose of avoiding or preventing a lawful arrest; and (4) in a manner involving torture, depravity of mind or the mutilation of the

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[11] *Roston* is quoting *Jones v. Cardwell*, 686 F.2d 754, 756 (1982).

victim. No mitigating circumstances were found. Gerow's testimony regarding Sechrest's criminal history and dim prospects for change were unrelated to any of the above aggravating factors. Therefore, Sechrest can only show prejudice by establishing that Gerow's testimony negated mitigating circumstances that would have been sufficiently strong to overcome the aggravating circumstances.

The only mitigating factor argued by the defense which may have been affected by Gerow's testimony concerned the jurors' failure to find that Sechrest lacked a significant history of prior criminal activity. NRS 200.035(1). Dr. Gerow testified that Sechrest admitted to an extensive history of prior involvement with the law. During closing argument, defense counsel recounted Sechrest's previous crimes, but emphasized Sechrest's lack of previous involvement in crimes of violence. Thus, the jury heard testimony other than Gerow's from which to reject this mitigating factor. In any event, even if Gerow's testimony is viewed as having the potential to dissuade jurors from finding this one mitigating factor, it is clear beyond a reasonable doubt that no error occurred that would have caused the jury to conclude that the four aggravating circumstances were outweighed by the arguably mitigating factor no matter how strongly it may have been established.

The evidence at trial exposed the heinous nature of Sechrest's brutal crimes. Nothing short of the most compelling mitigating

> circumstances would have offered the potential for a sentence other than death. None were shown to exist. Although Gerow's testimony was not flattering to Sechrest, it revealed little that the jurors would not have surmised from the brutality and lack of humanity associated with Sechrest's destruction of two imocent young lives. As the district court observed, Gerow's testimony was little more than cumulative. We agree, and are unable to conclude or remotely perceive that absent Gerow's testimony, there is a reasonable probability the result would have been different.

Sechrest, 108 Nev. at 162, 826 P.2d at 566-67 (footnotes omitted).

The United States Supreme Court has held that for there to be error warranting federal habeas corpus, the error must have "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Ninth Circuit Court of Appeals has concluded, "Only if the record demonstrates that that jury's decision was substantially influenced by the trial error or there is 'grave doubt' about whether an error affected a jury in this way" will Sechrest be entitled to relief. *Hegler v. Borg*, 50 F.3d 1472, 1478 (9th Cir. 1995). Based on the strength of the State's case, there can be no such doubt. The Nevada Supreme Court was correct in its analysis.

The jury's verdict was predicated on its determination that Sechrest was (and is) a cold-blooded monster who would kidnap, sexually

assault, and murder small children. It defies logic and ever common sense to argue that had Dr. Gerow not testified, the jury would have somehow sentenced Sechrest to any sentence other than death. As the Nevada Supreme Court found, the fact that Sechrest is a sociopath is something the jury could easily surmise "from the brutality and lack of humanity associated with Sechrest's destruction of two innocent young lives." Sechrest, 108 Nev. at 162, 82 P.2d at 567. Likewise, other witnesses testified about Sechrest's criminal past.[12] *Id.*

While Respondents maintain that no Fifth Amendment violation occurred, even if such error did occur, it did not effect the sentence. This claim should be denied by this Court.

5. <u>Sechrest's Sixth Amendment Rights Were Not Violated By Dr. Gerow's Testimony</u>.

Sechrest's final argument is that Don Aimar, his trial attorney, was ineffective for failing prevent Dr. Gerow from testifying or for preparing for the testimony.

In order to prevail on a claim of ineffective assistance of counsel, Sechrest will have to show both that counsel's conduct fellow below an objective standard of reasonableness and that Sechrest was prejudiced by his counsel's conduct. *Strickland v.*

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[12] Sechrest does not suggest why his own admission of prior criminal misconduct is somehow unreliable. He merely concludes that it is. It is not Respondents' responsibility to frame Sechrest's argument for him.

Washington, 466 US. 668, 687 (1984). *Strickland* imposes a "highly demanding" standard in which to prove "gross incompetence." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1985). *Strickland* stated that in clear cases, it is appropriate to consider only prejudice only without considering whether counsel was deficient. *Strickland*, 466 U.S. at 697. This is such a case.

However, Respondents will not concede that Aimar's performance was deficient. At the evidentiary hearing, Aimar testified that he allowed Dr. Gerow's testimony because he felt that Dr. Gerow testifying about Sechrest's background might be beneficial for helping the jury find mitigation. Exh. 95, p. 30. Aimar's stated reason for allowing the testimony is reasonable, even if the result was not what he may have hoped for. *See Denham v. Deeds*, 954 F.2d 1501, 1505-06 (9th Cir. 1992) (if counsel states a reason for not calling a witness, the reason will likely show effectiveness).

Regardless, the judge who heard the testimony at the evidentiary hearing focused on the second *Strickland* prong, as did the Nevada Supreme Court. Judge McGee, who presided over the evidentiary hearing, reached the following conclusion:

> Simply stated, it is Petitioner's contention that the conduct of Donald Aimar at the penalty phase fell below the acceptable standard for competency for a criminal defense attorney in a death penalty case. Specifically, Don Aimar allowed the testimony of Dr. Gerow at the request of Mills Lane, the district attorney in the case, without first talking to Dr. Gerow

> regarding his prospective testimony and thereafter, Don Aimar failed to properly object to the use made of that testimony by Mills Lane in cross-examination of various witnesses and in the final arguments made to the death penalty panel of jurors.

Exh. 103, pp. 1-2 (quoting Exh. 98, pp. 1-2). In its decision, Judge McGee analyzed various testimony and concluded:

> Mr. Aimar should have fully interviewed Dr. Gerow first and he should have calculated more precisely whether the potential risks of the physician's testimony outweighed the potential gain from his testimony. Plainly, the "balance" of Dr. Gerow's testimony does not favor Mr. Sechrest. It favors the State. For this reason, the Court finds that in this narrow circumstance, the level of Mr. Aimar's professional effort fell below that which the standards expect from an attorney in a capital case.

Exh. 103, p. 5. However, the Judge McGee went on to ask the rhetorical question, "'Was Dr. G telling the Sechrest jury anything it did not already know?'" *Id.* at p. 8. Judge McGee then answered his own question:

> [V]iewed from an objective standpoint, the evidence does not seem to be enough to have "tipped the balance." Dr. Gerow's testimony can instead be viewed in simply another way of describing the side of Sechrest which was already before the jury in the starkest fashion possible. In terms of its potential inflammatory

effect it may be likened to smoldering ember; the jury had already been exposed to the fire itself. Dr. Gerow's testimony could not have unduly nammed [sic] this panel of jurors; it could have helped to explain the inflammation which was already there to be seen.

* * *

Our case does not involve the credibility of Mr. Sechrest on issues of guilt; what it instead involves is his character and personality for purposes of meriting capital punishment. . . .

Mr. Lindsay further argues that the jury was exposed through Dr. Gerow's testimony to a record of previous criminal history by Sechrest, that the jury unnecessarily learned of charges of burglary, possession of stolen property, and narcotics in Illinois, Kentucky, and Nevada (see pp. 5 and 6 of the Penalty Hearing transcript and the further reference in closing argument at p. 114).

* * *

But can it be reasonably argued that a passing reference to a couple of property crimes and a victimless narcotics charge persuaded this jury to go with the death penalty? Hardly.

Perhaps this very kind of evidence could be used to support the proposition that Sechrest was more dangerous than a person without this past kind of record, but Sechrest's dangerous to future homeowners or possessors of property is

> certainly care of almost as much by life in prison without parole as it could have been by imposing the death penalty.
>
> This Court does not feel that it can be reasonably maintained that the Sechrest jury was focusing upon some remote possibility of future harm to society because of the commission of a property offense or a drug crime; they were focusing upon the immediate impact upon society of the heartless bludgeoning of two little girls.
>
> There are capital cases which seem borderline because of the confused mental state of the Defendant or perhaps the degree of provocation from the victim or victims. There are capital cases which seem borderline because of the motive of the Defendant or because of some mitigating aspect about his or her character. In a given case, evidence of profound remorse can play a role.
>
> Nothing like these circumstances are present in the case of Ricky Sechrest. This Court does not feel that this case is borderline, or that Ricky Sechrest was denied a fair hearing.

Exh. 103, pp. 10-11. The Nevada Supreme Court was even harsher in its assessment:

> In the penalty phase, the jury found four aggravating circumstances for each murder. Specifically, the jury found that the murders were committed: (1) during the course of a kidnapping; (2) during the commission or

attempted commission of sexual assault; (3) for the purpose of avoiding or preventing a lawful arrest; and (4) in a manner involving torture, depravity of mind or the mutilation of the victim. No mitigating circumstances were found. Gerow's testimony regarding Sechrest's criminal history and dim prospects for change were unrelated to any of the above aggravating factors. Therefore, Sechrest can only show prejudice by establishing that Gerow's testimony negated mitigating circumstances that would have been sufficiently strong to overcome the aggravating circumstances.

The only mitigating factor argued by the defense which may have been affected by Gerow's testimony concerned the jurors' failure to find that Sechrest lacked a significant history of prior criminal activity. NRS 200.035(1). Dr. Gerow testified that Sechrest admitted to an extensive history of prior involvement with the law. During closing argument, defense counsel recounted Sechrest's previous crimes, but emphasized Sechrest's lack of previous involvement in crimes of violence. Thus, the jury heard testimony other than Gerow's from which to reject this mitigating factor. In any event, even if Gerow's testimony is viewed as having the potential to dissuade jurors from finding this one mitigating factor, it is clear beyond a reasonable doubt that no error occurred that would have caused the jury to conclude that the four aggravating circumstances were outweighed by the arguably mitigating factor no matter how strongly it may have been established.

> The evidence at trial exposed the heinous nature of Sechrest's brutal crimes. Nothing short of the most compelling mitigating circumstances would have offered the potential for a sentence other than death. None were shown to exist. Although Gerow's testimony was not flattering to Sechrest, it revealed little that the jurors would not have surmised from the brutality and lack of humanity associated with Sechrest's destruction of two innocent young lives. As the district court observed, Gerow's testimony was little more than cumulative. We agree, and are unable to conclude or remotely perceive that absent Gerow's testimony, there is a reasonable probability the result would have been different.

Sechrest, 108 Nev. at 162, 826 P.2d at 566-67 (footnotes omitted). Respondents could belabor the point and repeat the analysis from the Nevada Supreme Court. Instead, Respondents adopt it as their own as proof that Sechrest was not prejudiced and that he cannot meet the prejudice burden.

Finally, Respondents feel compelled to address Sechrest's contention that this claim is governed by *Satterwhite v. Texas*, 486 U.S. 249 (1988), instead of *Strickland*. Sechrest is mistaken because he is confusing the nature of the Sixth Amendment claim in *Satterwhite* with the Sixth Amendment claim in his own petition. *Satterwhite* dealt with a denial of Sixth Amendment rights pursuant to *Estelle v. Smith*, 451 U.S. 454 (1981). *Satterwhite*, 486 U.S. at 254. It has *nothing* to do with a claim that counsel was ineffective. Sechrest can point to no case where the *Strickland*

standard is replaced for claims of ineffective assistance of counsel with a stricter standard.[13]

Finally, Sechrest confuses a claim of ineffective assistance of counsel with the underlying substantive claim. They are different and each is governed by its own standard. *Compare Kimmelman v. Morrison* , 477 U.S. 365 (1986) (ineffective assistance of counsel for failure to challenge evidence on Fourth Amendment grounds allowed) *with Stone v. Powell*, 428 U.S. 465 (1976) (Fourth Amendment claim not cognizable in federal habeas corpus if adequate opportunity to litigate issue in state court). As *Kimmelman* noted, "The two claims are distinct, both in nature and in the requisite elements of proof." *Id.* at 474.

Sechrest cannot show that he was prejudiced. His claim should be denied.

IV.

CONCLUSION

Based on the foregoing, Sechrest's Third Amended Petition should be denied in its entirety.

---

[13] The only case Respondents can think of which might have a higher standard is *Strickland*'s companion case, *United States v. Cronic*, 466 U.S. 648 (1984). However, *Cronic* deals with the complete *denial* of counsel, not mere ineffectiveness, including a breakdown of the adversarial process. *Id.* at 656-57. There is no claim that such a denial occurred in this case. Additionally, any holding that there is a different standard of review in *Estelle* cases would constitute a new rule barred by *Teague v. Lane*, 489 U.S. 288, 299 (1989).

RESPECTFULLY SUBMITTED this 7th day of October, 1999.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/
DAVID K. NEIDERT
Deputy Attorney General

* * *

[Certificate of Service omitted in printing of this appendix]

APPENDIX K

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

Case No. CV-N-92-536-ECR
(Death Penalty Case)

[Filed May 3, 2004]

RICKY DAVID SECHREST,	)
	)
Petitioner,	)
	)
v.	)
	)
JOHN IGNACIO, et al.,	)
	)
Respondents.	)
	)

MOTION FOR RECONSIDERATION OF THIS COURT'S APRIL 19TH, 2004 ORDER
(Federal Rule of Civil Procedure, 59(e))

This Motion is timely under Fed. Rule Civ. P. 6(a), 59(b), denying the Petition for habeas relief.

On April 19th, 2004, this Honorable Court entered its Order denying Petitioner, Ricky David Sechrest's, Third Amended Petition for Writ of Habeas Corpus made pursuant to 28 U.S.C., section 2254, requesting that Petitioner's sentence of death be set aside and corrected. In that Order this Court dismissed five Claims which were raised pursuant to a 9th Circuit Order which dismissed other Claims based upon Procedural Default; This Court is asked to reconsider it's decision regarding those Claims which were denied upon the following grounds:

Claim One: The Jury Instruction given violated the Petrocelli v. State Instruction as outlined in 1985 by the Nevada Supreme Court and was further exacerbated by the thirty plus prosecutorial misstatements made to the jury during the trial and penalty phase; Not only was the instruction improper, but the comments of the prosecutor add the element of prejudice to the improper jury instruction. The Court's order is inconsistent with the Petrocelli instruction and the recognizable misconduct of Mills Lane throughout this trial. This is not an argument about guilt, this is an argument about the death penalty and the Court is confusing the two. The trial is filled with the improper argument of Mills Lane (33 at last count), this instruction only typifies why the penalty phase was a shame and a farce.

Claim Two: A second attorney is presently required in all death cases, the present law reflects the Claims authenticity and further, the poor performance of Don Aimar reflects a need that no court should be able to

ignore. The facts of this case are not fairly being examined, instead only the rudiment s of justice remain, and here, justice has become the frail ideal trampled by a court's refusal to weigh these claims with an even hand, steady eye and conscious obligation. It's not the crime which Mr. Sechrest committed, it's the crime we commit when we crawl to a level the human condition can not tolerate. Killing is not inevitable, it is by definition, a volitional act carefully and calmly sought by the State, which serves no purpose, other than to insure the State is no better than the accused, the Courts are no greater than the poor souls which they condemn.

Claim Three: Miranda is the reflection that the middle ages are no longer the Common Law so explicitly laid upon on us by Black's Commentaries. Again, it's not that his confession was used to commit the crime, it's that the prosecutor, Mills Lane, continually made improper comments to the jury, without once receiving an objection to them by Don Aimar.

Claim Four: The Gerow testimony gave the jury the right to kill Mr. Sechrest. Not only was Don Aimar allowing testimony which he could have kept out, but his acquiesce reflects a total set of admissions that were never consented to by Mr. Sechrest. The Court also refuses to discuss the use of this testimony by the State, as cited, in which Mr. Lane was able to assure there was so mitigating evidence, just listen to Dr. Gerow. This isn't about guilt, this Petition is about the Death Penalty. This Court can choose its facts but to do so, it must ignore the whole.

Claim Five: In **JAMES LESLIE KARIS, Petitioner-Appellee, v. ARTHUR CALDERON, Warden, Respondent-Appellant. JAMES LESLIE KARIS, Petitioner-Appellant, v. ARTHUR CALDERON, Warden, Respondent-Appellee.** ***283 F.3d 1117; 2002 U.S. App. LEXIS 4304; 2002 Cal. Daily Op. Service 2446; 2002 Daily Journal DAR 2994 (March 18, 2002, Filed)*** the 9th Circuit Court examined the conduct of a penalty phase hearing in which the attorney failed to present mitigating evidence.

There does not appear to have been any risk in presenting the mitigating evidence of abuse. In addition, there is no indication that conducting a further investigation of abuse was not possible. There is no showing that counsel lacked the time or money to conduct further investigations. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland, 466 U.S. at 691.* Petitioner's trial counsel has provided no rational justification for his failure to pursue an investigation into petitioner's history of family abuse. Accordingly, the court finds counsel's assistance unreasonable under the Sixth Amendment.

With regard to the prejudice of counsel's failure to investigate, the District Court found:

Had counsel performed a proper investigation he could have offered substantial and wrenching evidence of petitioner's violent and abusive childhood. If this evidence had been offered at trial, it is likely that jurors would have concluded that petitioner witnessed his father and stepfather viciously beat his mother;

that both men also beat and abused him; [**40] and that petitioner's father molested him. There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California, 494 U.S. 370, 382, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990).* Thus, it is reasonable to expect that some jurors would have found this evidence especially important in understanding a defendant who had acted violently toward women. Considering the weak mitigation case put on, the prosecutor's focus on the lack of evidence of mental illness, and the strength of the evidence of abuse presented here, the court finds a reasonable probability that had counsel properly investigated and presented evidence of abuse, the result of the penalty phase would have been different. The court will recommend granting the petition for writ of habeas corpus on this basis.

Karis claims that counsel failed to investigate and present significant mitigating evidence of his childhood poverty, abuse, and the family dynamics. Karis' attorney had a duty to conduct reasonable investigation, including [**41] an investigation of Karis' background, for possible mitigating evidence. [*1135] Indeed, a substantial mitigating case may be impossible to construct without a life-history investigation. G. Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," *58 N.Y.U.L. Rev. 299, 321 (May 1983).* The supreme court has recognized the importance of informing the jury about the background and character of the defendant in a capital case.

This Court must realize that a full reading of this trial transcript and the penalty phase hearing reveals that Don Aimar was incompetent under any standard; He let Mills Lane walk all over him in a fashion that no trial attorney should ever tolerate. This Court has picked and chosen a few facts, while ignoring the whole, with no larger purpose than to white wash the prosecutorial conduct which is found on ever page of this trial and penalty hearing. Mills Lane committed prosecutorial misconduct through our this trial and penalty hearing, and Don Aimar did not more than consent to Dr. Gerow's testimony an the endless misconduct of Mr. Lane. The Second Amended Petition lists some thirty-three separate occasions, yet this Court's decision reflects only a minimalist approach to justice.

Further this Court is asked to reconsider those Claims which were denied and dismissed upon procedural default grounds in this Court's July 29th, 1996 Order regarding the Second Amended Petition, considering the recent decisions, Valerio v. Crawford, 306 F3rd, 742, (9th Circuit, 2002), and Petrochelli v. Angelon, 348 F3rd 877, (9th Circuit, 2001), specifically the Claim regarding the Aggravating Circumstances found by the Jury:

SECOND AMENDED PETITION

E. Failure of Don Aimar and Jane McKenna to object to all of the aggravating circumstances as found by the jury which were overly broad, vague or not supported by the evidence, therefore unconstitutional and a denial of due process to Ricky David Sechrest.

E. Failure of Don Aimar and Jane McKenna to object to all of the aggravating circumstances as found by the jury: overly broad, vague, not supported by the evidence; therefore a denial of Ricky David Sechrest's constitutional right to due process under the Fifth, Sixth, Eighth and Fourteenth Amendments.

The jury found that the murder was committed while Ricky David Sechrest was engaged in the commission or attempted commission of kidnapping in the first degree. Ricky David Sechrest repeatedly told the officers that he took the girls out there without any design or plan to hurt them. We know that he was introduced to several people at the mall, including, Tonya Wagner. (See Exhibit 43, September 14, 1983, p. 39). These were all friends of the girls and could easily have identified Ricky. On his way to the canyon with the girls, Ricky spoke with someone on the road, and referred to the girls as his sister and her friend. (See statement of Ricky David Sechrest as attached in Appendix to this Petition). If the girls were taken against their will, they most certainly would have spoken out when Ricky introduced them. If Ricky had intended to murder these girls, he would neither have allowed himself to be introduced to their friends at the mall nor would he have stopped to talk to someone on the road to the canyon. There was no evidence of a kidnapping save and except the speculative arguments of Mr. Lane.

Dr. Anton Paul Sohn who did the autopsy protocol, testified regarding evidence of sexual assault of the girls, "I did not notice any." (p.94, September 14, 1983) Mr. Thompson testified that he found on the panties of Maggie Schindler no foreign hair or seminal fluid.

(p.26, September 16th, 1983) The only evidence to support the four aggravating circumstances found by this jury was the confession of Ricky David Sechrest on the 14th day of June, 1983. (See Appendix)

The jury found that the murder was committed while Ricky David Sechrest was engaged in the commission or in an attempt to commit sexual assault. We know that Mr. Thompson and Dr. Sohn testified that there was no evidence of sexual assault, and once again, we are left with the confession of Mr. Sechrest. Mr. Sechrest's confession indicated that he touched Maggie Schindler after she had died. This is the only evidence regarding the sexual assault.

The jury also found that the murder was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody. We know Mr. Sechrest was not in custody and in his statement of June 14, 1983, he stated that he was afraid what Maggie was going to tell her mother. There is no independent evidence that Mr. Sechrest was trying to avoid arrest. The killings as described in his statement were spontaneous. There was no physical evidence offered by the State to controvert that statement. There is no independent evidence in the record which can sustain a finding that he was trying to avoid a lawful arrest. He wasn't being chased by police officers, there was no warrant for arrest issued against him, no one was looking for him.

The jury found that the murder involved torture, depravity of mind, or the mutilation of the victim. There is no evidence that either of these girls were tortured or mutilated. Depravity of mind is poorly defined and is unconstitutionally vague. The only

evidence presented to show the state of mind of Ricky David Sechrest was that of Dr. Gerow. That testimony was unconstitutionally admitted against Ricky David Sechrest and did not focus on his state of mind on the date of the murders. There is no independent evidence on the record to sustain the four aggravating circumstances that were found.

First, we reverse the district court's dismissal of Valerio's [**2] habeas petition as to the penalty phase of his trial. During the penalty phase, the jury was instructed to determine whether the murder with which Valerio was charged "involved torture, depravity of mind, or mutilation of the victim." The jury concluded that this aggravating circumstance was present and, based in part on this conclusion, sentenced Valerio to death.

The jury instruction was clearly unconstitutional under *Godfrey v. Georgia, 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980).* On appeal from a denial of state post-conviction collateral relief, the Nevada Supreme Court sought to cure the error pursuant to the procedure endorsed in *Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), overruled in part by Ring v. Arizona, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002),* by applying a narrowing construction of the instruction to a *de novo* finding of the facts. We hold that the *Walton* procedure is not available when a jury rather than the trial judge has found the facts and determined whether there were aggravating and mitigating circumstances. We also hold that, even if the *Walton* procedure [**3] were available, the Nevada Supreme Court failed to provide "close appellate scrutiny" and therefore failed to cure the instructional error. Evaluating the effect of the

error under *Brecht v. Abrahamson, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710* [*748] *(1993),* we hold the error not harmless. We therefore remand with instructions that, should the District Court upon remand deny Valerio's claims as to the guilt phase of his trial, it shall grant the writ as to the penalty phase and shall provide any appropriate interim relief. Valerio v. Crawford 306 F.3d 742, *; 2002 U.S. App. LEXIS 19168

John Espiredion Valerio, Petitioner-Appellant, Jackie Crawford. v. Director of the Department of Prisons; E.K. MCDANIEL, Warden, Respondents-Appellees.

This Court is asked to reconsider its Order and to allow a thorough briefing of these matters to assist the Court in a more rational and just result.

DATED this 30 day of April, 2004

/s/ _____
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* * *

[Certificate of Mailing omitted in printing of this appendix]

APPENDIX L

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Case No. CV-N-92-0536-ECR(RAM)
[Death Penalty Case]

[Filed May 17, 2004]

RICKY DAVID SECHREST,)
)
Petitioner,)
)
vs.)
)
JOHN IGNACIO, *et al.*,)
)
Respondents.)
)

OPPOSITION TO MOTION FOR RECONSIDERATION

Respondents, by and through counsel, BRIAN SANDOVAL, Attorney General of the State of Nevada, and DAVID K. NEIDERT, Deputy Attorney General, respectfully oppose RICKY DAVID SECHREST's ("Sechrest") Motion for Reconsideration. This Opposition is based on the following points and authorities, as well as all documents and pleadings on file in this case.

ARGUMENT

Rule 59 of the Federal Rules of Civil Procedure governs Motions for Reconsideration. According to Sechrest, he is entitled to rehearing because this Court erred in denying his five claims on the merits and for not considering grounds in the Second Amended Petition. Because Sechrest's arguments are all devoid of merit, his Motion for Reconsideration must be denied.

The Ninth Circuit has articulated when a Rule 59 Motion is proper:

> While Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources. Indeed, a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling

> law. A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.

Carroll v. Nukatani, 342 F.3d 934, 945 (9th Cir. 2003) (citations and internal punctuation omitted). Nothing in Sechrest's Motion for Reconsideration comes close to meeting the *Carroll* standard.

Sechrest first argues that this Court erred in failing to recognize that an instruction given in his case violated the Nevada Supreme Court decision in *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985). Respondents start by noting the obvious. Sechrest was convicted in 1983 *before* the Nevada Supreme Court decided *Petrocelli* in 1985. *See* Exhs. 56-59. Additionally, the Nevada Supreme Court expressly made *Petrocelli* prospective, holding:

> We therefore conclude, given the magnitude of the cases involved and the need to avoid prospective reversals resulting from unacceptable versions of this type of instruction, that hereafter (unless and until the law on the subject is modified), *in all trials commenced after the publication of this opinion,* and when requested by either the state or the defendant, the following instruction, and none other, may be given[.]

Petrocelli, 101 Nev. at 56, 692 Nev. at 510-11 (emphasis added). The Nevada Supreme Court has since repeatedly held that the *Petrocelli* Instruction is not retroactive. *Cavanaugh v. State*, 102 Nev. 478, 484

n.4, 729 P.2d 481, 485 n.4 (1986); *Rogers v. State,* 101 Nev. 457, 468-69, 705 P.2d 664, 672 (1985).

Additionally, to the extent that the *Petrocelli* Instruction is an issue of state law, it outside the scope of federal habeas corpus. *Estelle v. McGuire,* 502 U.S. 62, 72 (1991). Indeed, an argument that a jury instruction violated state law is outside the scope of federal habeas corpus review. *Mitchell v. Goldsmith,* 878 F.2d 319, 324 (9th Cir. 1989).

Significantly, Sechrest does not argue that this Court was wrong in citing *California v. Ramos,* 463 U.S. 992 (1983), largely because he can't. *Ramos* is the authority this Court must apply–and *Ramos* clearly held that an instruction on the possibility of executive clemency is proper. *Id.* at 1001-02.

As this Court correctly noted, an instruction is constitutional as long as it correctly stated the law. As this Court further noted, the instruction in Sechrest's trial merely stated in part, "Under the laws of the State of Nevada, any sentence imposed by the jury may be reviewed by the State Board of Pardons Commissioners." Exh. 51, Instruction 15. This Court rightly concluded that this was a correct statement of law.

Finally, this Court correctly held that even though the prosecutor misstated the law on commutation during part of his argument, this action did not have "a substantial or injurious effect on the jury verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1991). Respondents respectfully agree. Respondents find it fascinating that neither Maggie Schindler's nor Carly Villa's names are mentioned anywhere in Sechrest's

Motion for Reconsideration or his Traverse. Sechrest reserves pleas for mercy only for himself and not his victims.

Nowhere in Sechrest's pleadings does he acknowledge the facts that this Court so eloquently stated in showing Sechrest's monstrous depravity:

> The Court finds that the most important consideration informing the jury's sentencing decision must have been the aggravating circumstances relating to the nature of the crimes. The jury found that the murders were committed in the course of kidnappings and sexual assaults, and that they were committed to avoid lawful arrest or affect an escape from custody. The jury also found that the murders involved torture, depravity of mind, or mutilation of the victims. Sechrest took two innocent and trusting young girls–one nine years old and one ten years old–to a remote location and murdered them using rocks and a shovel. Sechrest then undressed one of the dead girls, attempted to have intercourse with her lifeless body, and then, when he could not, masturbated and ejaculated onto her body. The aggravating factors relating to the specific circumstances of these heinous murders were surely the predominant factor behind the jury's imposition of the death penalty.

Docket #136, pp. 21-22. This Court did not err in denying Ground 1.

With respect to Ground 2, Sechrest still has provided no legal authority, perhaps because none

exists, that *requires* two attorneys represent an accused in a capital case. Respondents do note that the "poor souls the state condemns" have had more due process and much more of a life than have their victims, including the two innocent children whom Sechrest so despicably murdered.

Sechrest's argument with respect to Ground 3 is incoherent. He makes no real argument that this Court's analysis was incorrect. *See* Docket #136, pp. 23-35. Instead Sechrest now wants to make Ground 3 a claim of ineffective assistance of counsel because his trial attorney did not object to the trial prosecutor's statements. Respondents are baffled as to how counsel could object to the prosecutor arguing about properly admitted evidence. However, since that is not what Ground 3 is about, Respondents will resist all urges to comment further.

With respect to Ground 4, Sechrest is clearly wrong when he claims, "The Gerow testimony gave the jury the right to kill Mr. Sechrest." Instead, the nature of the perverted crimes gave the jury the right to kill Mr. Sechrest. This Court explained in detail that Sechrest's Fifth Amendment rights were not violated because Dr. Gerow was retained as a defense expert. This Court very carefully explained that the fact the defense retained Dr. Gerow made the case significantly different than the one described in *Estelle v. Smith,* 451 U.S. 454 (1981), where a trial court *sua sponte* ordered a murder defendant to speak to a psychiatrist. *Id.* at 468. Docket #136, p. 36. Instead this Court correctly found that this case more closely resembled *Buchanan v. Kentucky*, 483 U.S. 402 (1987), which found *Estelle* inapposite when the defense joined the motion for a psychiatric evaluation. *Id.* at 422-23.

Docket #136, p. 36. No rehearing is warranted with respect to Ground 4.

Ground 5 is premised on Sechrest's contention that his trial attorney was ineffective in agreeing to allow the State to call Dr. Gerow as a witness. This Court very cogently explained why trial counsel's conduct was not objectively unreasonable. Docket #137, pp. 57-58. Additionally, this Court also properly found that Sechrest was not prejudiced, particularly since the Gerow testimony had nothing to do with the four aggravators the jury found. *Id.* at pp. 58-61.[1]

Finally, Sechrest wants this Court to consider issues from his Second Amended Petition. Respondents note that this Court denied Sechrest's *Third* Amended Petition. It is settled law in the Ninth Circuit that a plaintiff waives all claims in a prior complaint that are not re-alleged in an amended complaint. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997). "This rule is premised on the notion that the 'amended complaint supersedes the original, the latter being treated thereafter as non-existent.'" *Id. (quoting Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)). Though admittedly in *dicta*, the Seventh Circuit noted that an amended federal habeas corpus petition "supercedes the first." *Newell v. Hank*, 283 F.3d 827, 834 (7th Cir. 2002).

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[1] Sechrest snivels that "this Court has picked and chosen a few facts, while ignoring the whole." With all due respect, it is Sechrest who has picked and chosen facts to emphasize–while ignoring the nature of the crime and the strength of the State's guilt and penalty case against him.

Additionally, Respondents must note two other things. For the first time, in his Motion for Reconsideration, Sechrest asks this Court to consider issues in the Second Amended Petition. This is improper. *Carroll v. Nakatani,* 342 F.3d 934, 945 (9th Cir. 2003).

Second, Sechrest is engaging in piecemeal litigation, which is also prohibited. As the Supreme Court held over 40 years ago, "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders v. United States,* 373 U.S. 1, 18 (1963).

In this case, Sechrest filed his Third Amended Petition on May 20, 1999. Sechrest subsequently filed his Traverse on February 14, 2000. At *no time until now* has Sechrest asked this Court to do anything but rule on the five claims in the Third Amended Petition. Only *after* this Court denied the Third Amended Petition on the merits did Sechrest ask this Court to consider grounds in the Second Amended Petition. Respondents believe that the only reasonable explanation is that Sechrest was hoping that he would prevail in his Third Amended Petition, but if he did not, he would then raise an argument that somehow the Second Amended Petition has viability.

CONCLUSION

Sechrest was fairly tried, fairly convicted, and fairly sentenced for a monstrous crime almost unfathomable in its utter depravity. The State, no less than a criminal defendant, is entitled to justice under

the law. Having ensured that Sechrest's rights were not violated, the State has a compelling interest in seeing that Sechrest's lawful sentence might be carried out as soon as possible. His Motion for Reconsideration must be denied.

RESPECTFULLY SUBMITTED this 14th day of May, 2004.

BRIAN SANDOVAL
Attorney General

By: /s/
DAVID K. NEIDERT
Deputy Attorney General

* * *

[Certificate of Service omitted in printing of this appendix]

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-N-92-0536-ECR(RAM)

[Filed June 3, 2004]

RICKY DAVID SECHREST,	)
	)
Petitioner,	)
	)
vs.	)
	)
JOHN IGNACIO, *et al.*,	)
	)
Respondents.	)
	)

ORDER

In this capital habeas corpus action, on April 19, 2004, the Court entered an Order (docket #136), denying the habeas corpus petition. Judgment was entered the same day (docket #137).

On May 3, 2004, petitioner filed a document entitled "Motion for Reconsideration of this Court's April 19th, 2004 Order" (docket #138). On May 17, 2004, respondents filed an opposition to the Motion for Reconsideration (docket #139). Petitioner did not reply.

The Court finds that the Motion for Reconsideration does not present any grounds for relief. The Court of Appeals has provided guidance regarding Rule 59(e) motions:

> While Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." 12 James Wm. Moore *et al.*, Moore's Federal Practice § 59.30[4] (3d ed.2000). Indeed, "a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." [*Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citations omitted).] A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation. *Id.*

Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003). In essence, Rule 59(e) relief is appropriate: (1) if the Court is presented with newly discovered evidence, (2) if the Court committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. *Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Petitioner's motion does not satisfy those standards.

The Court has also considered petitioner's motion through the lens of Federal Rule of Civil Procedure

60(b). Rule 60(b) provides for reconsideration upon a showing of "(1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991) (citation omitted). Petitioner has not made a showing justifying relief under Rule 60(b).

IT IS THEREFORE ORDERED that petitioner's Motion for Reconsideration of this Court's April 19th, 2004 Order" (docket #138) is **DENIED**.

Dated this 3 day of June, 2004.

/s/
UNITED STATES DISTRICT JUDGE